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MINNESOTA REPORTS

VOL. 138

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

JULY 13—DECEMBER 7, 1917

HENRY BURLEIGH WENZELL
REPORTER

KEEFE-DAVIDSON CO.
SAINT PAUL
1918

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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE PEOPLE OF SAID STATE

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OF MINNESOTA

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By G. S. 1913, § 137, the reporter is required to report all cases decided by the court.

Pursuant to G. S. 1913, § 123, the headnote in each case is prepared by the justice or commissioner writing the opinion, except where otherwise noted.

With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in( ). The cases preceding the case beginning on page 103 are from the April, 1917, term calendar.

As required by G. S. 1913, § 137, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.

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BY ORDERS MADE IN OPEN COURT, THE OPINIONS WRITTEN BY THE COMMISSIONERS AND REPORTED IN THIS VOLUME WERE ADOPTED AS THE OPINIONS OF THE COURT BEFORE THEY WERE FILED, AND HAVE THE SAME FORCE AND EFFECT AS THOUGH WRITTEN BY A JUSTICE OF THE COURT.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

DE FORREST WARD v. ALBERT R. ALLEN.[1]

July 13, 1917.

Nos. 20,413—(111).

Chattel mortgage — delivery — no question for jury.

1. The evidence examined and *held* insufficient to warrant the submission to the jury of the question of delivery of the chattel mortgage under which plaintiff claims title.

Same — part performance of contract — evidence.

2. Plaintiff was not entitled to a directed verdict, for the evidence would justify the jury in finding that a valid contract was entered into whereby the said chattel mortgage was to be extinguished, that such contract had been partly performed by defendant, and that he was ready, willing and able to completely perform his part thereof.

Action in replevin in the district court for Martin county, or in case possession could not be had for $4,000, the value of the property. The case was tried before Quinn, J., who at the close of the testimony denied plaintiff's motion for a directed verdict, and a jury which returned a verdict in favor of defendant and found the value of the property was $1,500. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Reversed.

John E. Palmer, for appellant.

Putnam & Carlson, for respondent.

[1]Reported in 163 N. W. 749.

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HOLT, J.

Action in replevin. Defendant had a verdict, and plaintiff moved in the alternative for judgment non obstante, or a new trial. The motion was denied and this appeal resulted.

The parties were partners in the practice of law for 5 years. Upon the dissolution of the partnership the defendant gave to plaintiff his promissory note for $750, agreed to pay the firm indebtedness, with one exception, and took over the firm assets, including a law library and office furniture. About a year thereafter, or in September, 1908, to adjust the amount then due on the $750 note and upon the firm indebtedness, which plaintiff had in the meantime taken up, defendant gave plaintiff his three promissory notes in the sum of $1,500 each, secured by chattel mortgage upon the law library and office furniture. Default was made in the payment of these several notes, and, on September 1, 1911, the parties agreed that upon the four notes mentioned there was then due $6,000. To evidence this indebtedness defendant gave plaintiff two promissory notes, one for $1,500, due December 1, 1912, and one for $4,500, due five years from that date, both bearing six per cent interest. So far there is no material dispute between the parties. It appears that two chattel mortgages upon the property mentioned were executed at the time these two notes were made. The one securing the $1,500 note defendant admits; but the one purporting to secure the $4,500 note, being the one upon which plaintiff predicates his cause of action, defendant denies. The complaint alleged the ownership and right to the immediate possession of the goods described in the mortgage, their wrongful detention by defendant, after demand, and the value. The answer was a general denial, except the value of the property was admitted in the amount of $1,500. The court instructed the jury that defendant was entitled to a verdict, if they found there had been no delivery of the mortgage, and also the same verdict should be returned, if the facts were as claimed by defendant in respect to the compromise hereinafter referred to.

The main contention of appellant is that the verdict is not justified by the evidence under either of the two defenses submitted to the jury. The particular assignments of error challenging these defenses relate to the charge. It is claimed the court erred in submitting the question of

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delivery of this $4,500 chattel mortgage to the jury. A perusal of the testimony leaves us with the conviction that the verdict cannot be sustained if based upon nondelivery. Defendant in his testimony admitted his signature to the mortgage, declared his implicit confidence in the integrity of the notary who took his acknowledgment and of the witnesses to his execution of the instrument. It is true, he stated that, although the signature is his, he never consciously signed or acknowledged the execution of the mortgage, and further made the bald statement that it was not delivered; but we think that should be held on a par with the statement in respect to the signing and acknowledgment. The fact remains, he did sign and acknowledge the instrument and it is now in the hands of the grantee. If the signing and acknowledgment were unconsciously done, so must have been the delivery. The unconscious part must refer to the present recollection. After the lapse of five years the details of a transaction fade readily from the memory, especially of a busy lawyer who almost daily has to do with the execution and delivery of instruments. Defendant was a lawyer of many years standing. He labored under no mental disability. Apparently ample time was taken in adjusting the business both parties had in mind. It is inconceivable that defendant would unconsciously execute two chattel mortgages if he intended to execute but one. If he excuted the one for delivery, the other must have been executed for the same purpose. Plaintiff testified to a delivery and the legal presumptions as well as the surrounding circumstances are so strongly corroborative thereof that we conclude no issue was raised for the jury upon this defense. Jenson v. Chicago, M. & St. P. Ry. Co. 37 Minn. 383, 34 N. W. 743; Tucker v. Helgren, 102 Minn. 382, 113 N. W. 912; Murray v. Foskett, 114 Minn. 44, 130 N. W. 14.

This error will necessitate a new trial, for it cannot now be ascertained upon which submitted defense the verdict rests. It cannot be held that plaintiff has waived the right to challenge the defense now discussed by requesting an instruction as to the quantum of proof necessary to overcome the presumption of delivery.

But plaintiff claims that he was entitled to a directed verdict, and that the defense of equitable estoppel, so called, submitted by the court was not made out. We think the evidence made a case for the jury upon this

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branch of the defense. The situation on May 7, 1915, was this: Plaintiff had placed the $1,500 note in judgment, execution had been returned unsatisfied, and an order in supplementary proceedings had issued requiring defendant to make a disclosure concerning his property at 11 o'clock that day. The parties had previously met to adjust the matters between them, and had progressed so far that a meeting on this date had been arranged for in defendant's office at Fairmont. Early in the forenoon plaintiff arrived, and also Mr. Putnam who was to assist defendant. The judgment mentioned, with costs, amounted to nearly $1,800. The $4,500 was unpaid, but not due. The security was insufficient and the maker of the note of doubtful financial responsibility. Defendant testified that it was then and there agreed that he should pay plaintiff in full for all claims held against him $4,250. Of this sum $1,250 should be paid in cash, and the balance should be paid by plaintiff receiving a promissory note of one Virgens for $3,000 secured by an assignment of a one-third interest in a second mortgage of $10,000 upon Virgens' farm. An additional sum should also then be paid plaintiff equivalent to 3 per cent per annum upon the Virgens' note from that date to its maturity. This agreement having been concluded, Mr. Putnam, for defendant, went with plaintiff to the bank, procured $1,750 which was turned over to plaintiff who was to retain $1,250, was to satisfy the judgment and chattel mortgages, and return to defendant's office, where he was to receive the Virgens' note and mortgage and return to defendant any balance of the $1,750 that might come to him upon a proper computation of the additional interest plaintiff was to have on the Virgens' note. Plaintiff went to satisfy the note and mortgage and returned to defendant's office, when the Virgens' note with proper assignment of the mortgage securing it, as agreed, was tendered, but in the meantime the parties seem to have been unable to figure the additional interest plaintiff was to have upon the Virgens' note so as to arrive at the same result. Thereupon plaintiff refused to accept the Virgens' note and mortgage, and left without offering to return the money he had received. Plaintiff's version of the alleged settlement is unnecessary to here state. It differs materially from defendant's, but the jury could have found defendant's true. According to that a new contract was entered into based upon an adequate consideration. An apparently uncollectable judgment of $1,800,

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and a note of $4,500 equally doubtful, except as both were secured by chattel mortgages on property worth no more than $1,500, in defendant's opinion, the note not due until a year and four months thereafter, were compromised and settled for $4,250 in cash and note adequately secured as already stated. From these facts the jury might conclude that there had been to all intents and purposes an accord and satisfaction, so far as defendant was concerned, in that the promise of defendant to perform the compromise, or new contract, that is, to pay the money and turn over the Virgens' note and mortgage, had been accepted as a satisfaction of the accord. In section 98, 1 C. J. 567, it is said: "It is too well settled to admit of doubt that, if the promise or agreement itself, and not the performance thereof, is accepted in satisfaction of the demand, and the agreement to accept is based on a sufficient consideration, the demand is extinguished and cannot be the foundation of an action," and many cases are cited illustrating the rule. Among these we find Bandman v. Finn, 185 N. Y. 508, 78 N. E. 175, 12 L.R.A. (N.S.) 1134, which might be said to present facts of sufficient similarity to those here disclosed so that the same legal theory there applied ought to govern here. See also Chicora F. Co. v. Duncan, 91 Md. 144, 46 Atl. 347, 50 L.R.A. 401. The jury might well find that plaintiff accepted the promise of defendant to pay the $1,250 and assign the Virgens' note and mortgage with the additional 3 per cent as a full satisfaction of the compromise. If such were the fact, none of the old claims embraced in the compromise can be enforced. The circumstance that both parties were lawyers of experience points to the conclusion that their promises and agreements in the new contract were intended to satisfy and supersede the old claims as compromised. The $1,750 was no doubt turned over and received upon the new contract, and neither could have harbored the thought that it was to apply upon the prior claims. We think defendant's evidence on this branch of the case makes a question of fact to be decided by the jury under proper instruction.

Nothing need be said on the exclusion of exhibit H. If the exhibit be deemed material, we see no reason why a somewhat better foundation for its introduction may not be readily furnished at a future trial.

The assignments of error directed against the charge of the court re-

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quire no discussion, except to say that we fail to see how a defense of equitable estoppel can be worked out.

Since defendant professes to be anxious and willing to carry out the new contract, it is not amiss to suggest that he place his offer so to do in such shape at the trial of the case that plaintiff may be assured of what is still coming to him without further litigation.

The cause is remanded with direction to grant a new trial.

Mr. Justice Quinn took no part in the decision of this case.

ANNA DRAGER v. HERMAN SEEGERT.[1]

July 13, 1917.

Nos. 20,420—(211).

Gift — executed parol gift of land.

1. The evidence is *held* sufficient to justify the jury in finding an executed parol gift to defendant of the land involved in the action.

Witness — conversations with deceased donor admissible.

2. A witness having no interest direct or indirect in the land, though a daughter of the deceased donor, and a sister of the donee, *held* not disqualified under section 8378, G. S. 1913, from giving in evidence conversations with reference to and concerning the gift had by her with the deceased in his lifetime.

Same — interested party.

3. No prejudice resulted from the admission of the testimony of the wife of defendant, a mere fragment of the whole evidence tendered by defendant, of a conversation had by her with deceased, though she was interested in the homestead part of the land involved in the action, and perhaps disqualified under the statute.

No error.

4. The record presents no reversible error.

Action in the district court for Dakota county by the executrix of the last will and testament of William Seegert, deceased, to recover possession of certain lands. The defense set up in the answer is stated in the first paragraph of the opinion. The case was tried before Johnson, J.,

[1]Reported in 163 N. W. 756.

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and a jury which returned a verdict in favor of defendant. From an order denying her motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Affirmed.

W. H. Gillitt and *F. M. Wilson,* for appellant.

Mohn & Mohn, for respondent.

BROWN, C. J.

William Seegert was in his lifetime the owner of the land and premises involved in this action. He died on February 28, 1915, leaving what purported to be his last will and testament, in and by which he devised the land to his daughter, the plaintiff herein. The will was duly admitted to probate and plaintiff was commissioned as executrix thereof. She thereafter brought this action to recover the possession of the land, claiming it as a part of the estate to be administered under the will. Defendant is a son of the testator and he interposed in defense a claim of title to the land, the foundation thereof being an alleged gift thereof to him by decedent prior to his death.

The issue thus presented was submitted to the jury and resolved in defendant's favor by their verdict. Plaintiff appealed from an order denying a new trial.

The assignments of error present the general questions: (1) Whether the verdict is clearly and manifestly against the evidence; and (2) whether there was reversible error in the rulings of the court in the admission or exclusion of evidence, or in its instructions to the jury. We answer both questions in the negative.

1. The action is similar to those which have come before us during the past few years, wherein a like claim of title to real property has been asserted, and wherein the findings of the trial court or the verdict of the jury in favor thereof have been sustained upon evidence no stronger, and in some of the cases much weaker, than that here presented. Malone v. Malone, 88 Minn. 418, 93 N. W. 605; Schmitt v. Schmitt, 94 Minn. 414, 103 N. W. 214; Brasch v. Reeves, 124 Minn. 114, 144 N. W. 744; Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125; Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754; Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031. A discussion of the evidence would serve no useful purpose. If credible and worthy of belief it is abundant to support the verdict of the jury, not only as to the gift but the acceptance and performance of the

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conditions thereof by defendant. The evidence presents a familiar case of a son being induced to remain at home and work the farm, in consideration of the promise of the parents to give him the farm, and a final performance of the promise by a gift verbally made and accepted. The question whether the witnesses, one of whom was a sister of defendant, the others being neighbors and acquaintances of the family, were worthy of belief was for the jury and trial court. We discover from the record no basis for interference with their conclusion, and hold without a discussion of the facts that the evidence sufficiently supports the verdict.

2. It appears that subsequent to the date of the alleged gift the parties, father and son, entered into the following writing, namely:

"Cannon Falls, Aug. 18, 1913.

"Wm. Seegert: "Town of Welch, Minn.

"I hereby state that I have today rented my farm to my son, Herman Seegert, for the sum of $100.00, one hundred dollars, and my room and the necessary attention that is needed, and a horse and buggy or team and wagon when needed if possible to have, per year as long as I live.

"And I have today sold all my personal property to my son, Herman, for the sum of the debts on my farm and he is to pay the taxes on the land. Signed * * *

"WM. SEEGERT.

"HERMAN SEEGERT."

This document, having been written and signed by the parties after the date of the alleged gift, is persuasive evidence that the gift was not in fact made. But it is not conclusive, and though construed as a lease of the land, was open to explanation by defendant. The force and effect of the document and the merits of the explanation given by him for its execution were questions for the jury. Trebesch v. Trebesch, supra. The explanation was that the writing was prepared and signed to evidence the right of decedent to receive from defendant the sum of $100 per year during his life, as spending money, and to the other privileges stated therein. It appears that decedent stated to defendant that he thought he should have some writing upon the subject, and a neighboring farmer was called in, and upon being advised of the facts dictated the form of the document, and therefrom it was written down by defendant. That

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the explanation accords with the truth is corroborated by the evidence of declarations made by decedent subsequent to the writing, to the effect that he had given the farm to defendant. The explanation was satisfactory to the jury and trial court, and we accept their conclusion as final. The writing is not conclusive against defendant's present claim of a gift, nor is he thereby estopped. Section 6808, G. S. 1913; Trebesch v. Trebesch, supra.

3. Augusta Seegert, a daughter of decedent, and a sister of plaintiff and of defendant, was called as a witness in behalf of defendant and was permitted over the objection of plaintiff to testify to conversations had with decedent concerning the alleged gift of the land to defendant. The evidence so given was material and corroborated and supported the defense. The objection to the testimony was that the witness was disqualified under section 8378, G. S. 1913, from giving in evidence conversations with her father prior to his death. There was no error in admitting the evidence. The witness had no such interest in the result of the action, direct or indirect, as to render her an incompetent witness under the statute. The property was by the will of decedent devised to plaintiff; under the gift it belonged solely to defendant. The witness therefore had no interest in the controversy between those parties, for whatever the result she would neither thereby gain nor lose. Nelson v. Olson, 108 Minn. 109, 121 N. W. 609; Bowers v. Schuler, 54 Minn. 99, 55 N. W. 817; 3 Notes on Minn. Reports, 993; Alexander v. Ransom, 16 S. D. 302, 92 N. W. 418.

4. The wife of defendant was a witness in his behalf and was permitted to testify to conversations had with decedent as to the gift of the land to defendant. The only objection to this testimony was that since witness was the wife of defendant "her testimony is incompetent under the statute." If it be conceded that the objection sufficiently directed attention to the real ground thereof, namely, that the wife, having a direct interest in a part of the land, that portion constituting the homestead, was disqualified from giving in evidence a conversation with decedent in his lifetime (Mousseau v. Mousseau, 42 Minn. 212, 44 N. W. 193), we are satisfied that there should not be a reversal, even though the witness was erroneously permitted to testify. The evidence so given by her was in line with that given by several other witnesses, was a mere fragment of the whole, and we are clear that no prejudice resulted therefrom. If

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the whole thereof be excluded there is an abundance of what is left, if worthy of belief, to sustain the verdict. There was no prejudice to the substantial rights of plaintiff. Crowley v. Burns B. & M. Co. 100 Minn. 178, 110 N. W. 969; Madson v. Christianson, 128 Minn. 17, 150 N. W. 213, L.R.A. 1916C, 1214, Ann. Cas. 1916D, 1011. Dunnell, Minn. Dig. 1916 Supp. § 7180.

5. We discover no error in any of the other rulings complained of, nor in the instructions of the court to the jury. The remarks of the court in respect to the conduct of the attorneys in discussing the law of the case to the jury, if error at all, were not excepted to at the trial, the remarks applied equally to both parties, and we are clear that neither was in any way prejudiced thereby.

6. This covers all that need be said. We have fully considered all the points made, and the evidence has been carefully gone over, with the result stated.

Order affirmed.

L. F. ORENSTEIN v. PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK.[1]

July 13, 1917.

Nos. 20,427—(222).

Accident insurance — construction of policy.

The accident insurance policy, issued by defendant, insured plaintiff against disability or death resulting from bodily injury effected through external, violent and accidental means and provided that if the loss of either foot should "result solely from such injury within 90 days from the date of accident" the defendant would pay him a sum certain. Plaintiff suffered an accident to a toe on his left foot, within the meaning of the policy, on May 22, 1915. About three months later infection set in, and it became necessary to amputate the foot September 25, 1915. The loss did not take place within the time specified in the policy, and is not covered thereby.

Action in the district court for Ramsey county to recover $1,875 upon defendant's insurance policy. The case was tried before Olin B. Lewis,

[1]Reported in 163 N. W. 747.

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J., who made findings and ordered judgment in favor of defendant. From an order denying his motion for judgment upon the findings or for a new trial, plaintiff appealed. Affirmed.

C. D. & R. D. O'Brien, for appellant.

Barrows, Stewart & Ordway, for respondent.

HOLT, J.

While plaintiff held an accident insurance policy, issued by defendant, he met with an accident resulting in the loss of a foot. In this action to recover the amount stipulated in the policy, the court found that he was not entitled thereto. He appeals from the order denying a new trial.

The policy, made a part of the findings, provides that defendant "does hereby insure, subject to all the provisions and conditions herein contained or indorsed hereon, the person (herein called the insured) named and described in the aforementioned schedule * * * against disability or death resulting directly, independently and exclusively of any and all other causes from bodily injury effected solely through external, violent and accidental means. * * * Part 1. If any one of the following losses shall result solely from such injury within 90 days from the date of accident, the company will pay in lieu of other indemnity—for loss of either foot by severance at or above the ankle" $1,875. The court found that on or about May 22, 1915, plaintiff "received a bodily injury effected through external, violent and accidental means by which one of his toes on his left foot was cut and injured. That said wound did not heal, and on or about August 17th, 1915, said toe and foot became and was infected because of said cut and injury. That said infection progressed and continued until the 25th day of September, 1915. That by reason thereof plaintiff was obliged to submit to an amputation of his said left foot above the ankle; that said amputation and loss of said foot was due solely and entirely to the aforesaid injury received by plaintiff to said toe on the left foot." It was further found that plaintiff failed to give written notice of the accident and injury as required by the policy and that on or about November 8, 1915, defendant denied all liability.

The bodily injury effected through external, violent and accidental means which plaintiff met, and upon which the right of recovery must be predicated, occurred on the twenty-second or twenty-fifth day of May,

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1915, when the chisel of a chiropodist who was treating an ingrowing toe nail slipped and made a small cut or slit in the toe. The infection which happened to set in later is not a risk covered by the policy nor is the amputation unless the same can be traced to and based upon the accident in May. From the provision already quoted it is plain that the loss of the foot must have occurred within 90 days after the accidental injury of May 25, 1915, in order to give rise to indemnity under the policy. The language is so definite and clear in this respect that there is no room for construction. The finding is also clear that the accident was the slipping of the chisel in May, and not the infection in August. The loss of the foot, or the amputation thereof, took place September 25, 1915, more than 120 days after the accident. The loss is therefore not covered by this policy. 1 C. J. 469, § 179; Palmer v. Commercial Travelers Mut. Acc. Assn. of A. 53 Hun, 601, 6 N. Y. Supp. 870, affirmed in 127 N. Y. 678, 28 N. E. 256; Hagadorn v. Masonic E. Acc. Assn. 59 App. Div. 321, 69 N. Y. Supp. 831; Brown v. U. S. Cas. Co. (C. C.) 95 Fed. 935; and Perry v. Provident L. Ins. & Inv. Co. 99 Mass. 162.

Having reached the conclusion that the loss plaintiff sustained in the amputation of his foot was not covered by the policy, because it took place more than 90 days after the accident, we need not consider the questions raised concerning notice to defendant of the accident and loss or the waiver thereof, for, in any event, the order for judgment must remain as it now is.

The order is affirmed.

GEORGE H. LOVELL v. CLARA BELLE LOVELL BEEDLE.[1]

July 13, 1917.

Nos. 20,449—(229).

Parent and child — contract for payment of services — evidence.

1. A child, remaining a member of the family after becoming of age, is not entitled to pay for his services, unless they were performed pursuant to a prior agreement for compensation therefor; but such an

[1]Reported in 163 N. W. 778.

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agreement may be established by proof of facts and circumstances from which it may fairly be inferred.

Same — question for jury.

2. The evidence made a question for the jury as to whether the services in question were rendered pursuant to such an agreement.

Appeal and error — admission of improper evidence without objection.

3. Where no objection is made nor exception taken to the admission of improper evidence, and its admission is not assigned as error, this court must consider it as properly in the case.

Damages excessive.

4. Verdict *held* excessive, and a new trial is granted unless respondent consents to a reduction thereof.

Clara Belle Lovell Beedle filed in the probate court for Martin county a claim against the estate of George W. Lovell, deceased. From the allowance of the claim, George H. Lovell appealed to the district court for that county. The appeal was heard before Quinn, J., and a jury which returned a verdict for $5,241. From an order denying his motion for a new trial, George H. Lovell appealed. Affirmed on condition that respondent consent to a reduction of the verdict by $1,500.

Paul C. Cooper, for appellant.

Haycraft & Palmer, for respondent.

TAYLOR, C.

George W. Lovell, Sr., died intestate October 17, 1915. Respondent, his daughter, presented a claim for $5,000 against his estate for services rendered during the 10 years immediately preceding his death. The probate court allowed this claim in the sum of $3,000. Appellant, a brother of respondent, appealed from the probate court to the district court, where the issues were tried to a jury, who returned a verdict for respondent for the full amount claimed. Appellant made a motion for a new trial, and appealed from an order denying his motion.

Appellant invokes the well established rule that a child, remaining a member of the family after becoming of age, is not entitled to pay for his services, unless they were performed pursuant to a prior agreement for compensation therefor, and insists that the evidence is not sufficient to

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sustain a finding that the services of respondent were rendered pursuant to an agreement that she was to be compensated therefor by her father.

Such an agreement may be established either by proof of an express contract, or by proof of facts and circumstances from which it may be inferred that both parties understood that the services were to be paid for; and it is not necessary that the amount of the compensation should have been fixed by the agreement. Einolf v. Thomson, 95 Minn. 230, 103 N. W. 1026, 104 N. W. 290, 547; Beneke v. Beneke, 119 Minn. 441, 138 N. W. 689, Ann. Cas. 1914B, 381; Lansing v. Gregory, 128 Minn. 496, 151 N. W. 277; Thysell v. McDonald, 134 Minn. 400, 159 N. W. 958.

The other children of the decedent married and established homes for themselves. Decedent was afflicted with a cancer which covered the inside of his mouth, extended through his nose to his eyes and destroyed his eyesight so that he was blind during the 10 years for which the services are claimed. He required constant attention, and respondent was both housekeeper and nurse. As is usual in cases where one party is dead and the statute closes the mouth of the other, the evidence to establish a mutual understanding that respondent was to be paid for her services is rather vague and unsatisfactory; but a careful examination of the record satisfies us that the evidence is sufficient to make this a question for the jury. The decedent repeatedly stated to intimate friends that respondent would be paid for her services and she stated that she expected compensation therefor. There is evidence from which the jury could infer that it was understood by both parties that the decedent would make a provision for respondent in his will which would adequately compensate her for her services. Eleven years before his death, he had made a will which favored her, but which appears to have been destroyed. One of the witnesses to this will testified that the decedent had afterwards stated to him that he intended to destroy the old will and make a new one, and that he further stated as the reason therefor: "That he had made provision in the first will, but it was not sufficient for the work and care that Belle was giving him since the will was drawn up."

At the trial, both attorneys carefully refrained from asking respondent as to any conversation with her father, but the following took place: "Q. Belle, did you expect to be paid for these services that you rendered? A. I expected my father to leave me something extra. He had told me

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that he was going to. The court—He told you that he was going to? A. Yes, sir." Appellant complained of this at the argument and also in his brief; but as no motion was made to strike it out and no exception was taken, and as its admission was not assigned as error in the motion for a new trial, and is not assigned as error in this court, we cannot consider the error in its admission, if any there was, and this testimony is a part of the evidence in the case.

Appellant assigns as error several rulings upon the admission and exclusion of evidence, and one paragraph of the charge, but we find nothing in any of them justifying a reversal.

Appellant contends that the verdict is excessive. The jury allowed $500 per year for the full period of 10 years. Respondent and her father resided upon the father's farm. She had her support from the farm, and also acquired poultry and cattle of her own, which were kept upon and fed from the produce of the farm, and from which she received the proceeds. In this manner she accumulated a small sum of money. She was married two years before her father's death. Thereafter she, her husband and her father, lived in the house as one family, but she and her husband rented 80 acres of the farm from the father and carried it on upon their own account. What the arrangement was between them does not clearly appear. After considering all the circumstances disclosed by the record, we feel that the jury awarded a larger amount than the facts warranted. If, within 15 days after the filing of the remittitur in the district court, the respondent shall file in that court a written consent that the sum of $1,500 be deducted from the amount of the verdict, the order appealed from will stand affirmed; but if she shall fail to file such consent within the time stated, the order appealed from is reversed and a new trial granted.

Mr. Justice Quinn took no part in this decision.

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PHILLIP NARDINGER v. LADIES OF THE MACCABEES OF THE WORLD.[1]

July 13, 1917.

Nos. 20,450—(230).

Mutual benefit — answer in application for insurance.

1. In an action on a beneficiary certificate issued by a benefit association, one defense was that deceased, a married woman, stated falsely in her application that she was not pregnant. The evidence sustains a finding that the statement was true.

Appeal and error — no reversal because evidence was not in regular order.

2. A decision will not be reversed because material and proper evidence is received out of its regular order.

Mutual benefit — death from excepted cause — burden of proof on insurer.

3. Where an insurance contract exempts the insurer from liability if death results from certain excepted causes, the burden is on the insurer to prove that death resulted from an excepted cause, even though the plaintiff negatives such fact in his complaint. An erroneous instruction by the court, that the burden of proof is on the plaintiff, cannot aid the defendant in upsetting a verdict for plaintiff.

Same — evidence.

4. The beneficiary certificate sued on in this case exempted defendant from liability in the event of death from complications arising from pregnancy or childbirth. The evidence is sufficient to sustain the finding of the jury that death did not result from such cause.

Evidence — hypothetical question — opinion of another witness.

5. A hypothetical question calling for an opinion on facts testified to by another witness may exclude the opinion given by such other witness.

Action in the district court for Stearns county to recover $1,000 upon defendant's benefit certificate. The defense is stated in the paragraph of the opinion numbered 1. The case was tried before Roeser, J., and a jury which returned a verdict for the amount demanded. From an order

[1]Reported in 163 N. W. 785.

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denying defendant's motion for judgment in favor of plaintiff for $14 notwithstanding the verdict, or for a new trial, defendant appealed. Affirmed.

O'Malley & O'Malley, for appellant.

Donohue & Stephens, for respondent.

HALLAM, J.

Elizabeth Nardinger was a member of the Ladies of the Maccabees of the World, a fraternal beneficiary society, and was the holder of a beneficiary certificate in the sum of $1,000. Plaintiff was her husband and the beneficiary named in the certificate. Elizabeth Nardinger died of acute nephritis. As far as payment of dues and assessments was concerned, she was in good standing at the time of her death. Plaintiff brings this action to recover the amount of the certificate. The jury found for plaintiff. Defendant appeals.

1. Defendant contends that deceased, in her application for membership, made false answer to the question: "Are you pregnant?" The answer was "No." The court instructed the jury that if this answer was untrue, plaintiff cannot recover. The jury found that the answer was true. The evidence sustains this finding. The application of deceased for membership was made June 29, 1915. Deceased died February 13, 1916. On the morning of the day of her death a child was removed from her by a process called "forcible delivery." The child was a seven-months' child. It seems clear that the finding of the jury, that deceased was not pregnant when her application was made, was justified by the evidence.

2. Defendant contends that the testimony as to the stage of maturity of the child when born was improperly received. The objection is based on the fact that this evidence was elicited on cross-examination of the attending physician, who had been called by defendant, and that this was not proper cross-examination. We think the cross-examination was germane to the examination in chief and was proper. In any event, the testimony was material and proper. The order of proof is a matter resting largely in the discretion of the trial court, and a case will not be reversed because material and proper evidence is received out of its regular order.

3. The next question is this: The application for membership con-

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tained this clause: "I further agree that the order shall not be liable on any benefit certificate to be issued to me if I should die within nine months from my examination as a benefit member with complications arising directly or indirectly from pregnancy, or childbirth, or the consequences thereof; * * * provided that in case of my death from pregnancy, childbirth * * * within the time herein stated, the order shall pay to my beneficiary or beneficiaries the amount of all monthly rates contributed by me, which shall be the full measure of liability."

Defendant's claim is that deceased died "from complications arising directly or indirectly from pregnancy, or childbirth, or the consequences thereof." The contention is made by plaintiff that this provision of the contract is void as against public policy. See Merriman v. Grand Lodge D. of H. 77 Neb. 544, 110 N. W. 302, 8 L.R.A.(N.S.) 983, 124 Am. St. 867, 15 Ann. Cas. 124. We do not decide this question since the order must be affirmed on other grounds.

The burden was on defendant to prove that death resulted from a cause within the exception of the contract. Lockway v. Modern Woodmen, 121 Minn. 170, 141 N. W. 1; Thompson v. Bankers Mut. C. Ins. Co. 128 Minn. 474, 151 N. W. 180, Ann. Cas. 1916A, 277; Wising v. Brotherhood of A. Yeomen, 132 Minn. 303, 306, 156 N. W. 247. This rule is not changed by the fact that the plaintiff unnecessarily alleged that deceased did not die from any of the excepted causes. See Scheufler v. Grand Lodge A. O. U. W. 45 Minn. 256, 47 N. W. 799.

The trial court erroneously charged the jury that the burden of proof was on the plaintiff to prove that deceased did not die from a complication arising from pregnancy. This was not excepted to and, had the verdict been for the defendant, plaintiff would have been bound by his acquiescence in this ruling. Burgraf v. Byrnes, 104 Minn. 344, 116 N. W. 838. But we do not think that this erroneous ruling in defendant's favor can come to the aid of defendant in upsetting the verdict.

4. The clause quoted exempts the defendant from liability in case of death from complications arising from either pregnancy or childbirth. The evidence is reasonably clear that death did not arise in any manner from the childbirth. The testimony of the attending physician is that

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deceased was in extremis when the child was taken from her and that she would have died had the child not been removed.

Whether death resulted from complications arising from pregnancy is another matter. In considering this question, we may accept the fact, testified to by defendant's experts, that nephritis is one of the frequent complications attending pregnancy; that in a general way nephritis is caused by the presence of poison in the system; that this posion may come from without, or it may arise within the body, and that pregnancy is sometimes responsible for its presence. On the other hand Dr. Boehm, plaintiff's expert, testified that "pregnancy alone" does not cause nephritis. Probably there should not be any serious quarrel over this proposition. Dr. Beebe, defendant's expert, testified that healthy women do not have disease with pregnancy. This, in connection with the balance of his testimony, we take to mean that while the poison that causes nephritis may be produced by the pregnancy, it is not so produced where all organs of the body perform to the full their normal functions. If the testimony of any of defendant's experts would lead to any other conclusion, the jury were not obliged to follow it. But these matters are collateral to the issue. The testimony is uncontroverted that nephritis may result from a variety of causes and that nephritis may occur during pregnancy from causes entirely independent of it. The question was asked of medical witnesses on both sides whether, in their opinion, the nephritis of which Mrs. Nardinger died, was caused by pregnancy. Defendant's witnesses answered, "yes;" plaintiff's witnesses answered, "no." The facts are such that the jury might well have found for the defendant on this issue, but we cannot ignore the testimony of plaintiff's witnesses, and, in view of the fact that the burden of proof rests on the defendant as to this proposition, we feel bound to hold that the verdict of the jury has sufficient evidence to sustain it.

5. Objection is made that, in a hypothetical question to Dr. Boehm, counsel for plaintiff asked for an opinion assuming the testimony of Dr. Goehrs to be true, "excluding, however, his opinion that he gave." We think it was proper to exclude Dr. Goehrs' opinion from consideration. Crozier v. Minneapolis St. Ry. Co. 106 Minn. 77, 118 N. W. 256.

Order affirmed.

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MORRISON COUNTY LUMBER COMPANY v. P. O. DUCLOS AND OTHERS.[1]

July 13, 1917.

Nos. 20,457—(237).

Mechanic's lien — apportionment of mortgage debt on parcels with liens.

1. Where a mortgage exists on a tract of land and thereafter mechanics' liens attach to a part thereof the court may not, in an action to foreclose the latter, apportion the mortgage debt so as to fix only a certain amount thereof upon the part charged with the mechanics' liens.

Same — selection of tract by court.

2. Two of the mechanic's lien statements here involved stated that the materials were furnished for the construction of a brick manufacturing plant, of a named owner, upon a certain 100-acre tract. In selecting the 40 acres, to which the lien must be confined, the court included 20 acres not described in the said lien statements but which belonged to the owner of the plant and were used and adapted for the manufacture of brick. The error in the description in the lien statement did not preclude the selection made.

Same — loss of priority over subsequent mortgagee.

3. A lien claimant who does not, within one year after furnishing the last item of the labor or material, make a subsequent mortgagee a party to an action wherein the lien is foreclosed, or asserted, loses his priority, and the lien is gone as to such mortgagee.

Two actions in the district court for Morrison county to foreclose mechanics' liens. The cases were tried together before Roeser, J., who made findings as stated in the opinion and ordered judgment in favor of five mechanic lien claimants for specified amounts, a sale of the premises subject to the claim of the bank for the payment of such five claimants ratably. The motion of the First National Bank for amended findings of fact and amended conclusions of law or for a new trial was denied.

[1]Reported in 163 N. W. 734.

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From the judgment entered pursuant to the order for judgment, the bank appealed. Reversed.

D. M. Cameron and *Washburn, Bailey & Mitchell,* for appellant.

A. H. Vernon, N. N. Bergheim, E. P. Adams, C. Rosenmeier and *F. W. Lyon,* for respondents.

HOLT, J.

There is no substantial conflict of testimony in this litigation. The salient facts are these: Odilon Duclos was the owner of the land herein referred to in 1908, and gave a contract to convey to P. O. Duclos and another. This contract was afterwards modified and finally terminated. It is now conceded that the questions for determination are unaffected by what was done while the contract was in force. In the consideration of the case in this court, Odilon Duclos will be taken as the owner of the land who contracted with the materialmen for the improvements thereon and who gave the mortgages involved.

In 1911 Duclos gave to the First National Bank of Little Falls, hereinafter referred to as the bank or appellant, a mortgage upon the north half of the northwest quarter and the west half of the southwest quarter of the northwest quarter of section 24, and the north 30 acres of the southeast quarter of the northeast quarter and the east 20 acres of the northeast quarter of the northwest quarter of section 23, all in township 129, range 30, Morrison county, this state. The debt secured was $7,000. The mortgage was duly recorded. There was a brick yard on the land, but extensive improvements were made. Such improvements began to be constructed in 1913, and long prior to June of that year. The Morrison County Lumber Company, hereinafter called the lumber company and a respondent, Little Falls Iron Works and W. H. Ryan, all furnished material for these improvements for which mechanics' liens attached prior to June, 1913. They each, within 90 days after furnishing the last item of the material contracted for by the owner, and subsequent to June, 1913, duly made and filed lien statements in proper form. In the lien statements of the lumber company and Ryan, the property, for the improvement of which the materials were furnished and the lien claimed, was described as the north half of the northwest quarter and the west half of the southwest quarter of the northwest quarter of section

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24, township 129, range 30. No land in section 23 was specified or referred to. In the lien statement of the Little Falls Iron Works there was included the north 30 acres of the southeast quarter of the northeast quarter in section 23. On June 11, 1913, appellant, the bank, advanced or loaned Duclos an additional sum of $3,000 and took a new mortgage to secure the same in the sum of $10,000 upon the same land described in the old, and, in ignorance of the lien claims, satisfied the old mortgage. Within the year from furnishing the last item of material the lumber company began an action to foreclose its lien, but did not make the bank a party. Thereafter Ryan commenced a like action to foreclose his lien wherein the bank, the lumber company, and Little Falls Iron Works were made parties. But this action was instituted more than a year after the lumber company had furnished the last item of its material, and no answer was made therein by the lumber company. The bank, however, answered and alleged that its $7,000 mortgage had been satisfied of record by mistake and in ignorance of the existence of lien claims, and asked that it be reinstated of record and be held prior and superior to the liens, if any should be established. On motion the two actions were consolidated.

The court held each of the said three claimants entitled to co-ordinate liens upon the south 15 acres of the west half of the southwest quarter of the northwest quarter and the north 5 acres of the west half of the southwest quarter of the northwest quarter of section 24 and the north 20 acres of the southeast quarter of the northeast quarter of section 23, subject to the bank's mortgage to the extent of $2,100. The bank appeals from the judgment entered pursuant to the decision.

The assignments of error challenge the action of the court (a) in apportioning and setting off $2,100 of the reinstated $7,000 mortgage upon the 40 acres upon which the mechanics' liens were declared to have attached; (b) in selecting the 40 acres so as to include land not described in the lien statements of the lumber company and Ryan; and (c) in holding the lumber company's lien superior to the bank's $10,000 mortgage.

The court found that, on June 11, 1913, the $7,000 mortgage being unpaid, and Duclos desiring an additional loan, the bank did loan him $3,000 more. He then gave the bank a note for $10,000 and a mort-

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gage on the same land in the same amount and also gave certain collateral security. The mortgage was recorded June 12, 1913. The court also found "that thereafter the bank, in ignorance of the existence of the liens aforesaid and through inadvertence and excusable neglect, released its said seven thousand dollar mortgage." And further "that all the parties to these actions except the Morrison County Lumber Company have agreed in open court that the said * * * mortgage should be reinstated and satisfaction thereof canceled." For reasons to be hereinafter stated the lumber company is not affected by the cancelation of the satisfaction, for the $10,000 mortgage is superior to its interests. After this reinstatement of the prior mortgage, given and recorded almost two years previous to the time Ryan and the Little Falls Iron Works began to furnish materials, the rights of the bank thereunder became precisely as they were before the satisfaction was executed, that is, superior to the mechanics' liens of the two parties named. This superiority extended to every part of the mortgaged land. The mortgagee had a right to resort to the whole thereof for the satisfaction of his debt, and could not be forced to accept payment in part and release certain portions of the land or have fragments of the debt apportioned to different parts thereof. The judgment should have directed the sale of the land, upon which mechanics' liens were decreed, to be made subject to the reinstated mortgage. The bank did not ask to have its mortgage foreclosed, and in the foreclosure of these subsequent and inferior mechanics' liens we know of no practice which permits the court to apportion a part of the mortgage debt upon the land covered by the mechanics' liens. The trial court recognized the impropriety of marshalling of the bank's collateral securities in these proceedings.

The proposition is advanced by appellant that the court was without authority to carve out 40 acres of Duclos' land, upon which liens were allowed, so as to embrace land not described in the lien statements or in the pleading asserting the liens. Since the materials furnished were for the construction or improvement of a brick yard, it was proper to consider what part of the land of Duclos, adjacent to the structures of the plant, was contemplated to be used in the manufacture of brick and adapted for that purpose, such as clay beds and sand beds. Had the lien statements embraced the whole of Duclos' property, clearly it would

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have been proper to have selected the 40 acres as was here done. The liens specified the materials to have been furnished for the construction of the brick manufacturing plant. And we are of opinion that, with the other descriptions given, it was sufficient to impress a lien upon so much of the land designed and adapted for brick making, not exceeding 40 acres, as the court, upon proper proof, might determine. Errors of description in lien statements are not fatal if the property improved and subject to the lien may be identified. Tulloch v. Rogers, 52 Minn. 114, 53 N. W. 1063; Evans v. Sanford, 65 Minn. 271, 68 N. W. 21; Atlas Lumber Co. v. Dupuis, 125 Minn. 45, 145 N. W. 629. Here the owner does not object to the selection, and the subsequent mortgagee was not misled by the error in the description for no lien statement was filed when the $10,000 mortgage was taken.

There appears to be no basis upon which to sustain the lien of the lumber company as against the bank. The bank was not a party to the action brought by the lumber company to foreclose its lien. Ryan made both the bank and the lumber company parties, but, when his action was commenced and the bank was served, the time had elapsed within which the lumber company's lien could be asserted. As to the bank it had then no existence. Nor did the lumber company attempt to assert its lien against the bank in the Ryan action. It filed no answer therein. In this situation the mortgages of the bank must be held unaffected by the lumber company's lien, for the statute, G. S. 1913, § 7030, provides: "But no lien shall be enforced in any case unless the holder thereof shall assert the same, either by complaint or answer, within one year after the date of the last item of his claim as set forth in the recorded lien statement; nor shall any person be bound by the judgment * * * unless he is made a party thereto within said year." Steinmetz v. St. Paul Trust Co. 50 Minn. 445, 52 N. W. 915; Smith v. Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. 661; Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. 354; Falconer v. Cochran, 68 Minn. 405, 71 N. W. 686, are decisive of this question.

The respondents assert that since the bank asked for equitable relief herein the court could impose terms. We are not impressed by this argument. Respondents Ryan and Little Falls Iron Works expressly con-

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sented to the cancelation of the satisfaction of the $7,000 mortgage. And as to the bank it was beyond the power of the court to revive a lien which the statute declares dead.

It is urged by respondents that this is a case for marshalling of assets and protecting them by subrogation. It is sufficient to say that the court below was of the opinion that this was not a case for marshalling of assets, and the proposition of subrogation was not suggested below and hence, of course, the judgment makes no provision for either. In that situation the questions are not properly before us.

The judgment is reversed and the cause remanded for a new trial or for such amendments of the findings and order for judgment as the court below may deem advisable.

CITY OF ST. PAUL v. GREAT NORTHERN RAILWAY COMPANY.[1]

July 13, 1917.

Nos. 20,472—(249).

Railway — maintenance of bridge adequate for all traffic.

It is the uncompensated duty of a commercial railroad which intersects a public street to construct and maintain a bridge over its tracks when reasonable public necessity and safety demand. The use of a street for street railway traffic is a public use in aid of public travel. When the use of such street for a street railway line becomes an appropriate use of the street, though it was not so used at the time the bridge was constructed, it is the uncompensated duty of the railroad to strengthen it, if this be necessary, to make it fit for such use. It does not discharge its duty by maintaining a bridge adequate for passenger and vehicle traffic, and for all traffic except street railway traffic, when the use of the street for street railway traffic becomes an appropriate and needed use.

Action in the district court for Ramsey county to recover $13,047.38 expended in strengthening a bridge over defendant's tracks. The answer,

[1]Reported in 163 N. W. 788.

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among other matters, alleged that the city of St. Paul entered into an agreement with the street car company part of which reads as follows: "And provided further that the bridge over the railroad tracks of the Great Northern Railway Company on said Dale street be strengthened by said city of St. Paul sufficiently so as to carry safely the cars of said St. Paul City Railway Company;" and further alleged that said agreement on the part of the city of St. Paul was illegal and beyond its charter power, it being then and there the duty of said city of St. Paul to require the said St. Paul City Railway Company at its own cost and expense to strengthen said Dale street bridge to whatever extent was necessary to carry safely its street cars thereover. The case was tried before Orr, J., who made findings and ordered judgment for $2,655.28. From that part of the judgment which adjudged plaintiff not entitled to recover any amount whatever for moneys expended by it in strengthening Dale street bridge, for the purpose of fitting the same for street car traffic, plaintiff appealed. Reversed.

O. H. O'Neill and *J. P. Kyle,* for appellant.

M. L. Countryman, for respondent.

DIBELL, C.

This is an action to recover the amount expended by the plaintiff city in strengthening a bridge which passes over the defendant's railroad. The case was tried to the court without a jury. There were findings and judgment for the plaintiff in the sum of $2,655.28 and interest. The plaintiff appeals from the judgment.

The facts are undisputed. In brief they are these: Dale street, a public thoroughfare of St. Paul, and the right of way of the defendant Great Northern Railway Company intersect. In 1890 the defendant constructed a bridge on this street over its tracks at the intersection and has since maintained it. The St. Paul City Railway Company has a franchise from the city to operate upon the streets, and under it the city has the power to require it to extend its lines. On December 4, 1913, the city by ordinance directed the company to extend and operate its street railway on Dale street between points on each side of the bridge provided the bridge was sufficiently strengthened by the city. On May 2, 1914, the city, by an ordinance finding and declaring the public necessity, ordered

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the defendant to strengthen the Dale street bridge in accordance with certain plans and specifications so as to permit the street railway line to use it with safety. No question is made of the propriety or effect of the ordinance requiring the street railway company to operate its line on Dale, nor of the necessity of strengthening the bridge for its use. The defendant refused to comply with the ordinance. The city then strengthened the bridge at the reasonable cost of $13,047.38. Of this sum $9,507 was expended in strengthening the bridge for street railway use and $2,655.28 was expended in work which the defendant concededly should have done. The court found the defendant liable for the item of $2,655.28, and not liable for the item of $9,507, and judgment was entered for $2,655.28 and interest. The plaintiff claims that it should have recovered both items and that is the question.

Whether through legislative delegation St. Paul has power in an appropriate case to compel a railway company to bridge a street at a street and railway intersection is a question of state law. Atlantic C. L. R. v. City of Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. ed. 721. That it has such power is unquestioned. State v. Chicago, M. & St. P. Ry. Co. 122 Minn. 280, 142 N. W. 312. Nor is it questioned that a municipality with properly delegated police power in an appropriate case may compel railroads to construct overhead or other crossings at their own expense. Northern Pac. Ry. Co. v. Minnesota, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630; Cincinnati, I. & W. Ry. Co. v. City of Connersville, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. ed. 1060, 20 Ann. Cas. 1206; Chicago, M. & St. P. Ry. Co. v. City of Minneapolis, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. ed. 671; Atlantic C. L. R. Co. v. City of Goldboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. ed. 721. The state cases are to that effect. State v. Great Northern Ry. Co. 134 Minn. 249, 158 N. W. 972; State v. Great Northern Ry. Co. 130 Minn. 480, 153 N. W. 879; State v. Chicago, M. & St. P. Ry. Co. 122 Minn. 280, 142 N. W. 312; Twin City S. Co. v. Chicago, M. & St. P. Ry. Co. 118 Minn. 491, 137 N. W. 193; Chicago, M. & St. P. Ry. Co. v. City of Minneapolis, 115 Minn. 460, 133 N. W. 169, 51 L. R. A. (N. S.) 236, Ann. Cas. 1912D, 1029; State v. Northern Pac. Ry. Co. 98 Minn. 429, 108 N. W. 269; State v. St. Paul, M. & M. Ry. Co. 98 Minn. 380, 108 N. W. 261; State v. Minnesota Tran. Ry. Co. 80 Minn. 108, 83 N. W. 32, 50 L.R.A. 656; State v. St. Paul & D. R. 75 Minn. 473,

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78 N. W. 87; State v. Minneapolis & St. L. Ry. Co. 39 Minn. 219, 39 N. W. 153; State v. St. Paul, M. & M. Ry. Co. 38 Minn. 246, 36 N. W. 870; State v. St. Paul, M. & M. Ry. Co. 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313. The duty resting upon the railway is a continuing one, exists though the character of public travel and the demands of public necessity and safety change, and the police power residing in the municipality cannot be abridged, nor surrendered nor bargained away. Northern Pac. Ry. Co. v. City of Duluth, 208 U. S. 583, 23 Sup. Ct. 341, 52 L. ed. 630; State v. Minnesota Tran. Ry. Co. 80 Minn. 108, 83 N. W. 32, 50 L.R.A. 656; State v. Great Northern Ry. Co. 134 Minn. 249, 158 N. W. 972; State v. Chicago, M. & St. P. Ry. Co. 135 Minn. 277, 160 N. W. 773, and cases.

The defendant relies largely upon the following: Carolina Cent. R. Co. v. Wilmington St. Ry. Co. 120 N. C. 520, 26 S. E. 913; Briden v. New York, N. H. & H. R. Co. 27 R. I. 569, 65 Atl. 315; People v. Adams, 88 Hun, 122, 34 N. Y. Supp. 579, affirmed without opinion in 147 N. Y. 722, 42 N. E. 725; Conshohocken Ry. Co. v. Pennsylvania R. Co. 15 Pa. Co. Ct. 445. We have examined them. While some distinctions between them or most of them and the case before us may be drawn, and are suggested in the plaintiff's brief, they directly or indirectly support the defendant's contention and we have found them helpful. They are on the theory that when an existing railway bridge is adequate for ordinary foot and vehicle traffic a requirement that the railway strengthen it to meet the necessities of street car traffic is the imposition of an additional burden which it cannot be required to bear without compensation. In this view we do not concur.

The use of a street for street railway purposes is a proper street use. It is in aid of and facilitates public travel. It is a mode of using the street by the public and such use does not impose an additional servitude upon abutting property. Carli v. Stillwater St. Ry. & T. Co. 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; Newell v. Minneapolis, L. & M. Ry. Co. 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Elfelt v. Stillwater St. Ry. Co. 53 Minn. 68, 55 N. W. 116. A bridge is a part of the street. Willis v. Winona City, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142. The railway company crossing the highway is bound to restore it as near as may be to its former condition of usefulness and

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to keep it so. "The duty rested upon the defendant corporation when it occupied the avenue with its tracks, to restore the same, by some reasonably safe and convenient means, to its former condition of usefulness. And this duty was a continuing one." State v. Minn. Trans. Ry. Co. 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656. In State v. St. Paul, M. & M. Ry. Co. 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313, Justice Mitchell, in speaking of the duty cast upon the defendant railroad by a particular statute, said:

"The legislature never intended to fix or limit the duty of the company by the necessities of the public at any one time, or under any particular state of circumstances. They intended to impose upon the company the duty, from time to time, of putting the street in such condition and state of repair as changed circumstances—such as the increased travel on the street, or increased traffic on the railroad—might render necessary to its free and proper use."

Neither is the common-law obligation fixed as of the date when it arises and discharged by what is then done in its performance. In Chicago, B. & Q. Ry. Co. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596, 4 Ann. Cas. 1175, it was held that a railway company was properly required to remove an old bridge, adequate for the flow of water at the time it was constructed but inadequate later because of increased drainage, and construct a new one. A railway may be required to construct a new bridge or repair or replace an old one. What it may be required to do is measured by reasonable public necessity and safety. It must care for an added use or a changed use if it is a reasonable public travel use. The principle upon which its liability rests is clear. Its tracks interrupt street uses. It must restore the street to a condition of usefulness for public travel. A street railway affords one mode of public travel. The railway must make the street which it has disturbed fit for such use whether such use was needed when the bridge was constructed or only becomes necessary afterwards. We do not find that the contention now made by the railway has been urged before in any of our numerous crossing cases, though many of the bridges required to be built carried street railway tracks.

The four cases cited and relied upon by the defendant were before the court, and cited in the dissenting opinion, in Missouri Pac. Ry. Co.

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v. City of Omaha, 197 Fed. 516, 117 C. C. A. 12, which was affirmed in Missouri Pac. Ry. Co. v. City of Omaha, 235 U. S. 121, 129, 130, 35 Sup. Ct. 82, 59 L. ed. 157. That action was to enjoin the city of Omaha from requiring the plaintiff railway company by an ordinance which it had enacted to construct a viaduct over a street according to plans and specifications contemplating its use for street railway traffic and requiring an expenditure of $80,000 while a viaduct costing $30,000 was adequate for all other traffic. In holding the ordinance a valid exercise of the police power the Supreme Court said:

"It may be that it would be more fair and equitable to require the street railway company to share in the expense of the viaduct, and if the municipality had been authorized so to do by competent authority, it would have been a constitutional exercise of the police power to have made such division of expenses. Detroit, etc. Railway v. Osborn, 189 U. S. 383, 389 [23 Sup. Ct. 540, 47 L. ed. 860]. But there is nothing in the statute requiring the municipality to divide the expense of such improvement among those responsible for the dangerous condition of the street crossing. Where a number of railroads have contributed to the condition which necessitates such improvement in the interest of public safety, it is not an unconstitutional exercise of authority, as this court has held, to require one of the companies interested to perform such work at its own expense. Chicago, etc. Railroad Company v. Nebraska, 170 U. S. 57, 76 [18 Sup. Ct. 513, 42 L. ed. 948]. The broad authority to require any railroad company to make such improvement, in the interest of public safety, is conferred by the legislature upon the city. The safety of the traveling public is the primary consideration, and this is accomplished by the construction of the viaduct which is used by many people who travel across the viaduct every day. The public when being transported by the street railway company was exposed to the dangers of a grade crossing, which it was within the authority of the state to authorize the municipality to discontinue. Under competent legislation the city has undertaken to do this. In placing the expense entirely upon the railroad company, whose locomotives and trains are principally responsible for the resulting danger to the public, we do not find such abuse of the recognized authority of the state as has justified the courts in some cases in enjoining the enforcement of state and municipal legislation."

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This case recognizes the power of the city to compel a railroad to maintain at its own expense a bridge fit to carry street railway traffic. We apply and follow it.

So far as we are advised the city was without authority to compel the street railway to strengthen the bridge to make it safe for its use. The city was compelling the street railway to extend its lines and so far as the record shows it was the duty of the city to furnish an adequate street. We do not say that in the exercise of the police power a city might not require a street railway to keep the space occupied by its tracks in condition and repair and to relieve the city of the burden. Such question is not before us. It is not important that in the ordinance directing the street railway to extend its line there was a proviso to the effect that the city would strengthen the Dale street bridge. This was between the city and the street railway company. It is not correct to say that by the subsequent ordinance requiring the defendant to stregthen the bridge the city sought to shift the burden to the defendant. It was never upon the street railway, nor upon the city except as a condition to the street railway extending its line. If the duty rested upon the defendant the city could not waive or surrender it by an arrangement with the street railway or even by a contract with the defendant.

There should be judgment for the plaintiff for $12,162.28 with interest.

Judgment reversed.

MARTHA FEST v. WILLIAM OLSON AND OTHERS.[1]

July 20, 1917.

Nos. 20,268—(90).

Intoxicating liquor — sale on Sunday — liability of seller.

1. A sale of intoxicating liquor by a licensed saloonkeeper on Sunday is illegal and under G. S. 1913, § 3200, liability ensues for the proximate result of it.

[1]Reported in 163 N. W. 798.

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Same — evidence.

2. The evidence sustains the finding of the jury that the plaintiff's husband purchased intoxicating liquor in the saloon of each of the defendants on a Sunday, became intoxicated by its use, and as a proximate result of his intoxication was drowned.

Same — concurring cause — charge to jury.

3. To render a licensed saloonkeeper liable for an illegal sale, his sale need not be the sole cause of intoxication. It is enough if it is a co-operating, or concurring or proximately contributing cause. The charge of the court upon this point was correct.

Damages not excessive.

4. The verdict is not excessive.

Action in the district court for St. Louis county to recover $5,000 for the death of plaintiff's husband. The case was tried before Hughes, J., and a jury which returned a verdict for $3,000 and answered in the affirmative the question whether the husband of plaintiff on May 31, 1914, was furnished intoxicating liquor in the saloon of defendant Olson and in the saloon of defendant Giacoma. From an order denying their motion for a new trial, defendants appealed. Affirmed.

Fryberger, Fulton & Spear, for appellants.

Archer & Pickering and *Carl A. Onkka,* for respondent.

DIBELL, C.

This is an action by the plaintiff, Martha Fest, to recover for the death of her husband, Andres Fest, alleged to have been caused by the use of intoxicating liquor sold him in violation of law. There was a verdict for the plaintiff. The defendants appeal from the order denying their motion for a new trial.

The defendants Olson and Giacomo were licensed saloonkeepers in Gilbert, St. Louis county. Each operated a saloon. The defendant Illinois Surety Company was a surety on the statutory bond of each. The statute imposing upon licensed saloonkeepers liability for illegal sales is as follows:

"Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person, shall

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have a right of action, in his or her own name, against any person, who shall by illegally selling, bartering, or giving intoxicating liquors, have caused the intoxication of such person, for all damages sustained; and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parent, guardian, or next friend, as the court shall direct; and all suits for damages under this act shall be by civil action in any of the courts of this state having jurisdiction thereof." G. S. 1913, § 3200.

1. The plaintiff claims that the defendants sold her husband intoxicating liquor on Sunday, May 31, 1914. A sale on Sunday is illegal. Liability follows for the result coming proximately from the illegal act. Posch v. Lion B. & S. Co. 137 Minn. 169, 163 N. W. 131.

2. Fest lived on Ely Lake near Gilbert. In the afternoon of Sunday, May 31, 1914, he with some companions went to Gilbert. While crossing the lake on his return in the evening the boat upset and he was drowned. The jury found that he obtained intoxicating liquor from the saloon of each defendant, that his intoxication was caused by liquor sold by each, and that his intoxication resulted in his drowning. These were contested questions at the trial, and were submitted for special findings, and the determination of the jury reached upon sufficient evidence is final. The question of proximate cause was clearly for the jury. Posch v. Lion B. & S. Co. 137 Minn. 169, 163 N. W. 131; Wunsewich v. Olson, 137 Minn. 98, 162 N. W. 1054; Joyce, Intoxicating Liquors, § 433; 2 Woollen & Thornton, Intoxicating Liquors, § 1041; 11 Dec. Dig. Intoxicating Liquors, § 291; 29 Cent. Dig. Intoxicating Liquors, §§ 425-427.

3. Exception is taken to the following portion of the charge:

"In order that the intoxicating liquor may operate to cause the intoxication I take it that it is not necessary that the intoxicating liquor furnished be the sole cause of the intoxication; it is sufficient if it cooperates with other intoxicating liquors that may have been furnished to cause the intoxication, and if intoxicating liquors are furnished to a man who is already intoxicated which continues him in a state of intoxication further than he otherwise would be, it would be furnishing liquor operating to cause the intoxication, or if it increases the degree of his intoxication within the meaning of this statute."

The charge was correct. To render a defendant liable his sale need not

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be the sole cause of the intoxication, nor is it necessary, when illegal sales are made by more than one, that they act in concert. To charge either it is enough that his sale was a co-operating or concurring cause or one proximately contributing to the result. The statutes of the different states vary in phraseology, but the rule stated is one of general application. Wardell v. McConnell, 23 Neb. 152, 36 N. W. 278; Gorey v. Kelly, 64 Neb. 605, 90 N. W. 554; Werner v. Edmiston, 24 Kan. 147; Faivre v. Manderscheid, 117 Iowa, 724, 90 N. W. 76; Simser v. State, 17 Ind. App. 519, 47 N. E. 229; Black, Intoxicating Liquors, § 299; Joyce, Intoxicating Liquors, § 435; 2 Woollen & Thornton, Intoxicating Liquors, § 1045.

4. The plaintiff was a man 28 years of age, in good health, and capable of earning good wages. The verdict was for $3,000. It is not excessive.

Order affirmed.

EDWARD KUHNE v. JOHN GAU AND OTHERS.[1]

July 20, 1917.

Nos. 20,331—(154).

Parent and child — advancement — promise to repay.

1. Where a father makes an advancement to his daughter and then dies testate, the advancement becomes a mere gift. A promise to repay it to other heirs and a mortgage given to secure the performance of such promise, are without consideration.

Same — construction of pleading.

2. An allegation in pleading that an advancement was made, cannot be construed as an allegation that a loan was made, even though the donee after the death of the donor makes an agreement to repay.

Contract — consideration stated not good — presumption.

3. When seals were in use in this state, a seal affixed to a contract imported a good consideration, but where the contract purported to state the consideration and the consideration stated is not good, it will not be presumed that some other consideration existed which was good.

[1]Reported in 163 N. W. 982.

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Action in the district court for Stearns county to foreclose a mortgage. Mathias Gau and Jennie Gau demurred to the complaint on the ground that the facts stated in the complaint did not constitute a cause of action. The demurrer was overruled, Roeser, J. From a judgment in favor of plaintiff, certain of the defendants appealed. Reversed.

E. L. McMillan, for appellants.

Theodore Bruener, for respondent.

HALLAM, J.

This is an appeal from a default judgment. The only question raised is that the complaint does not state facts sufficient to constitute a cause of action.

1. The facts alleged are as follows: Fred Kuhne died testate in March, 1894. He gave certain land to his widow for life, and after her death in undivided shares to his nine children.

In November 7, 1894, Elizabeth Gau, one of the children, gave to the other children a mortgage for $1,000 on her interest in the land. Plaintiff is now the owner of the mortgage. The consideration of the mortgage is not alleged, nor is there any allegation as to the facts or circumstances under which it was given, but the mortgage itself was attached to the complaint and it recited that Elizabeth Gau received from her father during his lifetime "as an advancement" the sum of $1,000, that Elizabeth did not, during the lifetime of her father, acknowledge the receipt of said advancement in writing, and "she is now desirous * * * that the said one thousand dollars ($1,000) so received as aforesaid should be deducted from her share of said estate after the expiration of the life estate" of her mother, and she acknowledged receipt of said $1,000 as an advancement, and "in consideration of the said sum of one thousand ($1,000) dollars so received for the purpose of securing the said amount to the other children," gave this mortgage, and in it promised to pay said sum to the other children. This action is to foreclose the mortgage. Elizabeth Gau is now dead and defendants are her heirs.

The contention of defendants is that this mortgage is without consideration. The theory is this: The doctrine of advancements has no application to testate estates. If a father gives his daughter $1,000 as an advancement, such amount will, in the event of the father dying intestate,

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be deducted from the daughter's distributive share of the estate, but, if the father leaves a will, it will not be deducted from the share given her in the will, for the will is supposed to contain the final manifestation of the testator's bounty, and all advancements not saved by the will are extinguished (Kragnes v. Kragnes, 125 Minn. 115, 145 N. W. 785), and though it was understood at the time the payment was made that it should be an advancement, if the donor dies testate it becomes an absolute gift.

The allegations of the complaint disclose that situation here. The advancement was a gift. Every advancement is a gift. Even in case of intestacy it remains a gift. An advancement is never to be returned. In case of intestacy, the gift reduces by so much the share of the heir receiving it, while in case of testacy the gift becomes absolute.

It is settled in this state that, where such a gift is fully executed, a promise by the donee to repay it, is without consideration. Kragnes v. Kragnes, supra. If the allegations of the complaint are true, then this mortgage was without consideration and it cannot be enforced.

2. Plaintiff contends the word "advancement" where it appears in the mortgage is not to be taken in the legal sense but that it should be construed to mean a loan. We cannot agree to this. The term is not ambiguous. It has a well understood meaning. It does not signify a loan. It signifies only a gift. A promise made after the donor's death to repay it does not convert it into a loan. The recital in the mortgage is, of course, not conclusive of the nature of the transaction, but it is all that we have before us.

Plaintiff contends that this amount may, in fact, have been a loan, that the mortgage may have been the result of a family settlement, or of a compromise of a doubtful right. If the complaint had alleged any of these things, it would have stated a cause of action. But it did not do so, either in terms or by inference. When its sufficiency was challenged, plaintiff made no move to amend so as to allege any of these things. He stood on the allegations of the complaint as at first drawn. These allegations were not sufficient.

3. Plaintiff contends that the seal upon the mortgage executed in 1894, while seals were in use in this state, imported a good consideration. It would have imported a good consideration had there been no attempt to

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state the real consideration, but where a consideration is stated in the instrument and the consideration so stated is an invalid one, it will not be presumed that another consideration existed which was good. Storch v. Duhnke, 76 Minn. 521, 79 N. W. 533.

Judgment reversed.

ROBERT WAGNER v. G. M. SEABERG.[1]

July 20, 1917.

Nos. 20,360—(184).

Contract — work and labor of adult son — finding sustained by evidence.

1. The evidence was sufficient to justify the jury in finding that services rendered by a son to his father after he became of age were not rendered gratuitously, but pursuant to an agreement that they should be paid for at the death of the father.

Same — statute of limitations.

2. The agreement being that the services should not be paid for until the father's death, the statute of limitations did not begin to run until that event.

Damages not excessive.

3. The verdict is not excessive.

Witness — examination of witness.

4. There was no prejudicial error in the court taking part in the examination of a witness.

Robert Wagner appealed from a judgment of the probate court for Martin county disallowing his claim for $7,500 against the estate of Peter R. Wagner, deceased, to the district court for that county. The appeal was heard before Quinn, J., and a jury which returned a verdict for $5,088 and answered in the affirmative the question: Was it understood and expected by both Peter Wagner and the appellant Robert Wagner that the appellant Robert Wagner was to be paid for the services which he rendered for his father Peter Wagner after he became 21 years of age?

[1]Reported in 163 N. W. 975.

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and fixed the value of the services for the last 6 years of his father's life at $2,880. From an order denying his motion for a new trial, G. M. Seaberg, administrator of the estate, appealed. Affirmed.

S. P. Hall and *Haycraft & Palmer,* for appellant.

Albert R. Allen, for respondent.

BUNN, J.

Peter R. Wagner, a resident of Martin county, died January 31, 1915. He came to Martin county in 1889 from Illinois, where he had lived for many years, raising a family of six children. His wife had died some time before, and shortly before he came to Minnesota he married again. Robert Wagner, the plaintiff, was the son of his second wife by a former marriage. Robert came to Minnesota with his mother and his stepfather, and was shortly afterwards legally adopted by the latter as his son. Peter's children by his first wife remained in Illinois. Robert became of age in 1901, and continued to work on the farm until his father's death. His mother died in June, 1915. Both died intestate. Robert of course inherited from his mother her share in the farm of her husband, and from his father an equal share with his other children.

Robert filed a claim against his father's estate for $7,500, the alleged value of his services for the 15 years after he became of age. The claim was disallowed by the probate court, and Robert appealed to the district court, where, after a trial to a jury, he recovered a verdict of $5,088. The administrator moved for a new trial, the motion was denied, and this appeal taken.

1. There is no doubt that Robert worked faithfully and well for his father, who was old and incapacitated from work himself. He managed the farm, and cared for his parents, all without compensation, except his living expenses. It is equally undisputed that the children who remained in Illinois did nothing for their father in his illness and old age. Of course all this does not entitle Robert to compensation, unless he proves an agreement by his father to pay for his services. This is elementary. The first claim of defendant on this appeal is that the evidence was insufficient to overcome the presumption that the services were rendered gratuitously. We need but refer to the most recent of the numerous cases in this state bearing on the question. In Lovell v. Beedle, supra, page

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12, 163 N. W. 778, it was reiterated that the agreement of a parent to pay for the services of his child may be established by proof of facts and circumstances from which it may be inferred that both parties understood that the services were to be paid for, and it is not necessary that the amount of the compensation should have been fixed. Testing the evidence in this case by the rule stated, we easily reach the conclusion that it was sufficient to overcome the presumption and to justify a recovery by plaintiff. Of course Robert could not testify to conversations with his father, but at least three disinterested witnesses testified to repeated declarations by the father, both in the presence of Robert and when he was not present, to the effect that the latter had worked the farm since he was a small boy, must continue to work it, and would have the farm as compensation on the death of the declarant. We need not give in detail these declarations, but will content ourselves with saying that, considered with the admitted fact that Robert stayed and worked for his parents during the best years of his life, they sufficiently show an understanding that the son should be paid for his services by receiving the farm as his own at his father's death. The evidence to show an agreement by the father to compensate the son for his services is at least as persuasive as it has been in several of the cases decided by this court. The declarations testified to were more than mere passing remarks, showed more than a mere expectation on the part of the father, unexpressed to the son, to pay for the services, and an expectation of the son to receive pay. The father having failed or neglected to give the farm to Robert by deed or will, the latter was not obliged to sue for specific performance, but might do as he did, file a claim against the estate for the reasonable value of his services.

2. The next contention of defendant is that the claim of plaintiff for services during all the years except the last six is barred by the statute of limitations. This would be true if plaintiff's agreement with his father gave him the right to recover for a year's work at the end of the year, or at any time before six years prior to the time the claim was presented. But this was not the agreement or understanding. Plaintiff was to receive his pay on his father's death, and until then had no cause of action. It follows that the statute did not begin to run until Peter Wagner died. In re Hess' Estate, 57 Minn. 282, 59 N. W. 193.

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3. It is claimed that the verdict was for an excessive amount. The jury allowed plaintiff something like $360 a year for his services. Considering what these services were, and the evidence as to the value of such services, we find no ground for holding the verdict excessive.

4. The court took a hand in examining a witness, asked leading questions, and elicited answers favorable to plaintiff. This is assigned as error. We are able to see no prejudice, even if we concede that the examination was not proper and that defendant is in a position to raise the question here.

Order affirmed.

Mr. Justice Quinn, having tried the case below, took no part.

GOTTLIEB MARTIN v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.[1]

July 20, 1917.

Nos. 20,389—(188).

Appeal and error — review — motion for judgment non obstante.

1. As defendant asks for judgment notwithstanding the verdict without asking for a new trial, the only question presented is whether the record shows that plaintiff is not entitled to recover.

Negligence — contributory negligence — questions for jury.

2. The evidence made a question for the jury as to whether defendant's negligence was the proximate cause of the injury and as to whether plaintiff was chargeable with contributory negligence.

Costs — taxation of disbursements.

3. The expense for making a plat and for taking X-ray photographs cannot be included in the taxation of costs and disbursements against the losing party.

Action in the district court for Sibley county to recover $10,052, for injuries to person and property caused by negligence in operating de-

[1]Reported in 163 N. W. 983.

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fendant's train. The answer alleged that plaintiff knew of the conditions at the crossing where the accident occurred and that he assumed the dangers and risks incident to the happening of the accident. The case was tried before Morrison, J., who when plaintiff rested denied defendant's motion to dismiss the action, and at the close of the testimony defendant's motion for a directed verdict, and a jury which returned a verdict for $1,400. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Modified.

F. M. Miner and *W. C. Odell,* for appellant.

T. Otto Streissguth and *Mead & Bryngelson,* for respondent.

TAYLOR, C.

This is a railroad crossing case. After a verdict for plaintiff, defendant moved for judgment notwithstanding the verdict, but did not ask for a new trial. The motion was denied, judgment entered upon the verdict, and defendant appealed.

As defendant does not seek a new trial but rests its case upon the claim that it is entitled to judgment notwithstanding the verdict, the only question presented is whether it appears from the record that plaintiff is not entitled to recover. Bennett v. Great Northern Ry. Co. 115 Minn. 128, 131 N. W. 1066, 37 L.R.A.(N.S.) 521; Velin v. Lauer Brothers, 128 Minn. 10, 150 N. W. 169; Prigge v. Selz, Schwab & Co. 134 Minn. 245, 158 N. W. 975.

That defendant failed to give warning of the approach of the train by blowing the whistle or ringing the bell is not disputed, but defendant contends that this negligence was not the proximate cause of the accident for the reason that plaintiff's team became frightened, escaped from his control and ran upon the track in front of the train. The accident happened on November 11, 1915, just as it began to grow light in the morning. In a heavy wind and sleet storm, plaintiff, driving a span of horses hitched to a top buggy with closed curtains, approached the crossing from the north. There is an industrial track 37.7 feet north of the main track. From the highway westward there are buildings along this track which obstruct the view toward the west. Plaintiff was entirely familiar with the crossing. As he approached it, he leaned forward beyond the

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curtains of his buggy, looked and listened for a train, and brought his team to a walk. He did not see or hear a train, but, as he passed the corner of the building upon the industrial track, the glare from the headlight of a locomotive fell upon his horses, one of which was nearly blind. This horse, apparently frightened by the sudden light, made a jump, which jerked one of the lines out of plaintiff's hands, and ran across the track in front of the locomotive. The horses cleared the track, but the buggy was struck and plaintiff injured. We think that the evidence made a question for the jury as to whether the failure to give the usual warnings of the approach of the train was the proximate cause of the injury, and also as to whether the plaintiff was chargeable with contributory negligence.

In preparation for the trial, plaintiff had a surveyor make a survey and plat of the locus in quo, and also had a physician make an examination and take X-ray photographs for the purpose of showing the nature and extent of his injuries. The expense incurred for these purposes was allowed by the court, taxed against defendant as a part of the disbursements and included in the judgment. The losing party is not liable for such expenditures. Shterk v. Veitch, 135 Minn. 349, 160 N. W. 863. The court will modify the judgment by eliminating therefrom the amount allowed for these items, and as so modified it will stand affirmed.

JENS J. OPSAHL v. FRANK E. JOHNSON AND ANOTHER.[1]

July 20, 1917.

Nos. 20,390—(200).

Intoxicating liquor — local option election — tribal Indian voters.

At an election held in Beltrami county to determine whether the sale of intoxicating liquors should be prohibited 58 mixed and full blood Indians, of the Red Lake band of Chippēwas, inhabitants of the Red Lake reservation, voted. Of these 6 were full citizens, having received allotments under the Dawes and Nelson Acts.[2] The others had applied for

[1]Reported in 163 N. W. 988.

[2][24 St. 388; 25 St. 642.]

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allotments, but no action had been taken by the government. If these 52 mixed and full blood Indians, who were not allotees, had not voted, concededly, the result would have been in favor of prohibiting the sale of intoxicating liquors. The trial court found that the mixed bloods, comprising at least 46 of the 52, had adopted the habits and customs of civilization, and because thereof were qualified voters. It is *held:*

(1) The contestant went so far in sustaining the burden of proof on the proposition of noncitizenship of the 52, as a class, that if any exception existed among them it was for contestees to point out.

(2) Indians of the Red Lake band of Chippewas, inhabiting the Red Lake Indian reservation as wards of the government, are residents of the state within the meaning of article 7 of the Constitution.

(3) To entitle a noncitizen mixed blood Indian to the right of suffrage, his adoption of the habits and customs of civilization must go to the extent of submitting himself to the laws of the state. The evidence and findings established that the persons referred to were tribal Indians, residing upon the reservation as wards of the government, owing no allegiance to the laws of the state, not taxable, and not bearing any of the burdens to which other voters are subject.

Jens J. Opsahl appealed to the district court for Beltrami county from the determination of the county canvassing board of the election held August 14, 1916, on the question whether the sale of intoxicating liquor should be prohibited, wherein said board declared there were 1555 ballots cast at said election in favor of prohibiting the sale of liquor and 1569 ballots so cast in favor of the sale of liquor. Frank E. Johnson, intervener and contestee, and the county of Beltrami filed answers. The appeal was heard before Stanton, J., who made findings and ordered judgment that the voters decided against prohibiting the sale of liquor. From the judgment entered pursuant to the order for judgment, contestant appealed. Reversed.

H. J. Loud, J. L. Brown and *Montreville J. Brown,* for appellant.

E. E. McDonald, T. C. Bailey and *Graham M. Torrance,* County Attorney, for respondents.

HOLT, J.

On August 14, 1916, an election was held in Beltrami county to determine whether the sale of intoxicating liquors should be prohibited therein. The canvassing board found a small majority against prohib-

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iting such sales. Appellant filed a contest which was duly tried, and the court made findings of fact and conclusions of law that, by a majority of 19, the voters determined that the sale of intoxicating liquors should not be prohibited. From the judgment entered pursuant to the findings this appeal is taken.

The contest is based solely upon the vote in the Red Lake precinct which is wholly within the Red Lake Indian reservation. In this election district 92 votes were cast. Thirteen were in favor of prohibiting the sale and 79 against. It is practically conceded that, if 52 of the 58 persons belonging to the Chippewa tribe of Indians, located on the Red Lake Indian reservation, who voted in this precinct had no right so to do, the majority was in favor of prohibiting the sale and the judgment should be reversed. The specific finding upon their status is as follows:

"That of these 58 there were six who possibly might be full blooded Indians, but it is probable that they were also mixed white and Indian blood. That all of said persons of mixed white and Indian blood had, prior to said election, adopted the habits and customs of civilization. That of said 58 persons, six had received allotments and that the others had filed applications for allotments, but no allotments had been made to them. That all of said 58 persons were members of what is known as the Red Lake tribe of Indians. That there was at Red Lake an Indian Agency in charge of an acting Indian Agent and disbursing officer, and that the names of said 58 persons were upon a payment roll and that they received payments from the United States government as interest upon moneys belonging to them and others held by the United States government."

Construing these findings in the light of the evidence, the treaties and acts of Congress relating to the so-called Red Lake Indians, we think it fairly appears that the 58 persons referred to were, with the possible exception of 6 full bloods, mixed blood Indians of the Red Lake band of the Chippewa tribe who, as members thereof, were entitled to live on the Red Lake reservation under the special care and protection of the Federal government, and who had not seen fit to sever this relation. It also appears that these Indians have adopted the habits and customs of civilization to quite an extent, in that they live in separate dwellings, constructed and furnished after the manner of the surrounding white sett-

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lers. Most of them can understand and speak English and even write their names, are members of Christian churches, and make a living much the same way as people in the vicinity of the reservation.

The right to vote at our state and municipal elections is granted by article 7 of our state Constitution. Section 1 of said article provides that every male person of the age of 21 years and upwards belonging to either of these three classes shall be entitled to vote, if he has resided in the state and election district the specified time, viz.: "1. Citizens of the United States who have been such for the period of three months next preceding any election. 2. Persons of mixed white and Indian blood, who have adopted the customs and habits of civilization. 3. Persons of Indian blood residing in this state who have adopted the language, customs and habits of civilization, after an examination before any district court of the state, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of citizenship within the state."

The burden was upon contestant to establish that these 52 voters did not possess the right to vote. It is claimed he fell short, because, even if it should be held that the persons referred to were not entitled to the right of suffrage as members of either the second or third classes of section 1, article 7, of the Constitution, the proof did not exclude them from the first class, that of citizens. It is true that a mixed blood Indian is a citizen if his father was. State v. Nicolls, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B, 1088. And no doubt more mixed bloods spring from a white father and an Indian or mixed blood mother than from a white mother and an Indian or mixed blood father. But it is also, probably, true that very many of the mixed bloods of a white father are not the issue of lawful wedlock. An illegitimate child takes the status of the mother. Alberty v. U. S. 162 U. S. 499, 16 Sup. Ct. 864, 40 L. ed. 1051. It is also well known that many of the white men who assumed relations with Indian women were not citizens. The citizenship of mixed and full bloods residing upon this reservation seems to us so extremely doubtful that we think contestant made a prima facie case of noncitizens as to all of the 58 who voted, except the 6 who had received allotments, when it was shown that these persons lived upon the government reservation as wards of the United States. In the evidence and findings these 52 per-

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sons were treated as of one class, viz., mixed or full blood Indians in the same tribal relation. In this situation we think contestant sustained the burden of proof that the persons referred to were not entitled to vote as citizens on the assumption that they were the offspring in lawful wedlock of a full citizen father. If any exceptions existed we should look to the other side to pick them out, since the status of the whole class of these 52 voters was discredited because of the same general disqualifying conditions. Respondents concede that if the majority of the 52 did not possess the right of suffrage the judgment should go for contestant.

That these 52 mixed and full blood Indians were not citizens, and as such entitled to vote, because they were born within the territorial limits of Minnesota, must be considered settled. Scott v. Sanford, 19 How. 393, 15 L. ed. 691; Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. ed. 643; Board of Commrs. of Allen County v. Simons, 129 Ind. 193, 28 N. E. 420, 13 L.R.A. 512; Anderson v. Mathews (Cal.) 163 Pac. 902. Nor can we sustain the proposition that they have become citizens because of their application for allotments under the Dawes Act of 1887 [24 St. 388], supplemented by the Nelson Act of 1889 [25 St. 642]. No action had been taken by the government upon the applications when the election took place, except as to 6 of the 58, and, until some act of the government in recognition of the desired emancipation, it cannot be said that citizenship has been bestowed. In Elk v. Wilkins, supra (pages 106, 107), it is said: "But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself."

It is not claimed that the full bloods had complied with the provision of class 3, section 1 of article 7 of the Constitution, giving them the right to vote. We come then to the proposition whether the mixed bloods of the 52 qualified within class 2. The court so found. It is not to be denied that these mixed bloods have adopted the habits and customs of civilization to a certain extent. With the assistance of the Federal government and the schools maintained by it, these Indians have advanced considerably on the road of civilization. They, however, still cling to

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some of the customs and habits of their race, and are governed in their relation with each other by their peculiar tribal rules and practices, subject, in a certain sense, to the advice and supervision of the Federal authorities. The facts as to their mode of life are much the same as in Bem-way-bin-ness v. Eshelby, 87 Minn. 108, 91 N. W. 291, where it was said: "While these facts show that the plaintiffs have reached a degree of civilization superior to that manifested by many white men, yet the facts warrant no other conclusion except that they are tribal Indians, and subject to the disabilities incident to their status as such." These 52 persons have not taken up the duties imposed by the state upon other voters. The lands they occupy and the improvements thereon are not subject to taxation. The lands whereon they reside and all funds from which their annual interest or annuities are paid are public lands and public moneys not subject to taxation. Stephens v. Cherokee Nation, 174 U. S. 445, 488, 19 Sup. Ct. 722, 43 L. ed. 1041. They are under a sort of guardianship of the Federal government with which the state cannot interfere. Can it be said that persons so situated have adopted the customs and habits of civilization within the meaning of the constitutional provision quoted? This is a new question in this state, and, so far as we are advised, the right of mixed blood Indians to vote under a constitution similar to our own has received no judicial interpretation elsewhere.

Respondents say the language of the Constitution, defining the class of mixed blood Indians to whom the elective franchise is extended, is so plain and unambiguous as not to be open to construction. But were it otherwise, it is said, the constitutional debates upon the provision under consideration and the practice thereunder, sanctioned by the authorities in charge of elections, indicate that these mixed blood Indians were entitled to vote. It is true the debates, especially in the Democratic branch of the constitutional convention from such men as Joseph R. Brown, Flandrau, Emmett, Curtis and others, warrant the deduction that it was not then deemed necessary that Indians and mixed bloods sever their tribal relation in order to become qualified voters. As to the practical construction, it is doubted that it has been so general a practice in this state to vote reservation Indians that this court can take judicial knowledge thereof. The record in this case is not convincing that such a practice prevails. To be sure, it is made to appear that this election precinct

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has existed some 15 years on the reservation, and that some of these men probably voted before this. There were undoubtedly on the reservation persons in the employ of the government and others, full citizens, who were legal voters and a voting district could be lawfully established on that territory. Hankey v. Bowman, 82 Minn. 328, 84 N. W. 1002. But it by no means appears that the mixed bloods generally were allowed to vote; therefore no great weight should attach to the alleged practical construction.

Appellant takes the position that these Indians are not residents of the state within the meaning of said article 7, citing Sinks v. Reese, 19 Oh. St. 306, 2 Am. Rep. 397, and McMahon v. Polk, 10 S. D. 296, 73 N. W. 77, 47 L.R.A. 830. The cases cited relate to military reservations which do not occupy the same status as an Indian reservation. The holding in Hankey v. Bowman, supra, and such cases as State v. Campbell, 53 Minn. 354, 55 N. W. 553, 21 L.R.A. 169; Selkirk v. Stephens, 72 Minn. 335, 75 N. W. 386, 40 L.R.A. 759; State v. Cooney, 77 Minn. 518, 80 N. W. 696, is that state laws extend in a certain sense over the territory embraced in an Indian reservation, though not as to the wards of the government residing thereon. It is not so with a military reservation. We cannot therefore hold that simply because of their living within the reservation these mixed blood Indians were not residents of the state within the meaning of section 1, article 7, of the Constitution.

But there are other cogent reasons urged by contestant against holding mixed bloods living on Indian reservations entitled to vote. The exercise of the elective franchise is a participation in government and in the making of the laws to which all the inhabitants of a nation, state, or municipality must yield obedience. It cannot for a moment be considered that the framers of the Constitution intended to grant the right of suffrage to persons who were under no obligation to obey the laws enacted as a result of such grant. Or, in other words, that those who do not come within the operation of the laws of the state, nevertheless shall have the power to make and impose laws upon others. The idea is repugnant to our form of government. No one should participate in the making of laws which he need not obey. As truly said by contestant: "The tribal Indian contributes nothing to the state. His property is not subject to taxation, or to the process of its courts. He bears none of the burdens of civiliza-

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tion, and performs none of the duties of the citizens." To emphasize this situation, we merely need call attention to the fact that, no matter in what respect tribal Indians, not citizens, would violate our election laws, they could not be punished therefor, provided the acts were committed on the reservation. State v. Campbell, supra. In Selkirk v. Stephens, supra, in speaking of the limitations of the state's jurisdiction over the Indian reservations and the tribal Indians thereon, it is said that the state cannot tax the property of the Indians, or interfere with their control while on the reservation, or punish them for acts committed thereon in violation of law, that they are the wards of the general government and the state may not interfere with or impair the efficiency of such guardianship. The syllabus in U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. ed. 228, referring to tribal Indians, is: "The states have no such power over them as long as they maintain their tribal relations. The Indians owe no allegiance to a state within which their reservation may be established, and the state gives them no protection."

Another reason for denying an intention to confer the right of suffrage upon tribal Indians is seen in the provisions of section 2, article 4, for representation in the legislature which reads: "The representation in both houses shall be apportioned equally throughout the different sections of the state, in proportion to the population thereof, exclusive of Indians not taxable under the provisions of law." Tribal Indians on reservations are not taxable. Selkirk v. Stephens, supra; U. S. v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. ed. 532. Different provisions in a constitution should be harmonized. It is not thinkable that, when care was taken to exclude certain persons from the count when a district's representation in the legislature is to be determined, it, nevertheless, was intended that the persons so excluded should participate in the election of the representation so fixed. It is an indication that the persons excluded from being counted as a part of the population of the district are also to be excluded from participating either as voters or as candidates at elections.

It would seem rather incongruous for Indians to participate in elections relating to the sale of intoxicants. Their vote affects not their own personal needs, for the law makes it a crime to furnish them with intoxicating liquors. G. S. 1913, §§ 3148, 3182. This prohibition follows an Indian even when a citizen. State v. Wise, 70 Minn. 99, 72 N. W. 843.

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In Ontario the elective franchise appears to be conferred upon Indians on government reservations. An act, called the Canada Temperance Act, is in force under which an election similar to the one here in question may be held. There, as here, exists a stringent law against furnishing liquor to Indians. Re Metcalf, 17 Ont. 357, 359, 360, the question arose whether at such an election the votes of Indians dwelling upon the Indian reservation could be received. In granting a prohibition against receiving such votes from Indians upon the reservation, but not from electors residing thereon, the court said: "The special act governing the Indians was more stringent than any law governing the white population, and the Canada Temperance Act can have no operation where the Indian Act is in force. The Indians are supposed, and properly supposed, not to be able to govern themselves as to the use of 'fire water,' as they call it, and therefore the legislature has wisely placed a stringent law upon the statute book. The township of Tuscarora is under that law, and the Indians dwelling there have nothing to do with the Canada Temperance Act. It is a violation of the first principles of justice to say that Indians should be allowed to vote upon the repeal of the act. It would be another phase of the wrong done in the taxation of the colonies." We do not decide that under our Constitution a person, who is a qualified elector, may be denied the right to vote upon some certain proposition. But the argument advanced in the case cited has force, and bears on the unreasonableness of holding that the framers of the Constitution intended to extend the suffrage to those who are excluded from count in fixing the representation in the legislature, and to persons who will not be subject to the laws which the legislature may enact.

We reach the conclusion that tribal Indians have not adopted the customs and habits of civilization, within the purview of the elective franchise provisions of our Constitution, until they have adopted that custom and habit which all other inhabitants must needs adopt when they come into the state, namely, that of yielding obedience and submission to its laws. No doubt the right of suffrage was by this state held out as an inducement to the Indians to sever their tribal relations and adopt in all respects the habits and customs of civilization, and that means a taking up of the burdens which the laws of the state place upon all its inhabitants alike. This the Indian may do by taking up his abode outside the reser-

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vation and there pursuing the customs and habits of civilization. The policy of the general government also is to accelerate this emancipation. When lands are allotted under the Dawes and Nelson Acts, the allottee becomes a full citizen. This has not been accomplished as to any of the Indians in question except the six mentioned.

We think the learned trial court erred in his conclusions and the judgment should be reversed.

So ordered.

Chief Justice Brown did not sit in this case.

JOHN S. CHRISTISON v. ST. PAUL FIRE & MARINE INSURANCE COMPANY.[1]

July 20, 1917.

Nos. 20,393—(212).

Automobile insurance — liability of insurer — construction of policy.

Defendant insurance company issued a policy to plaintiff, insuring him against loss by reason of liability imposed by law for the destruction of or injury to the property of others, arising from plaintiff's ownership, maintenance or use of certain automobiles. A clause of the policy provided that "the company's liability * * * is limited to the actual intrinsic value of the property damaged or destroyed at the time of its damage or destruction, which shall not be greater than the actual cost of the repair or replacement thereof." One of plaintiff's automobiles collided with another car and damaged it, under circumstances which rendered plaintiff liable. Defendant paid the owner of the injured car the amount of the bill for repairs paid by him. Thereafter the owner of the injured car recovered a judgment against plaintiff for the depreciation in the value of his car caused by the accident over and above the amount paid for repairs. Plaintiff paid this judgment, and brought this action to recover the amount so paid, with attorney's fees, from defendant under the policy. It is *held* by a majority of the court that the limitation clause above quoted does not limit the liability of defendant

[1]Reported in 163 N. W. 980.

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to the actual cost of repairs made, when it appears that they do not and cannot make the car as good as it was before the accident, and that plaintiff may recover the amount of the judgment paid by him for depreciation in the value of the car, with attorney's fees incurred in defending the suit.

Action in the district court for Ramsey county to recover $179.30 upon defendant's automobile insurance policy. The case was tried upon stipulated facts before Olin B. Lewis, J., who made findings and ordered judgment in favor of defendant. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

O'Brien, Young & Stone, for appellant.

Ware & Junell, for respondent.

BUNN, J.

This is an appeal by plaintiff from a judgment in favor of defendant entered pursuant to a decision after a trial by the court without a jury.

Plaintiff contends that the findings of the trial court do not sustain the conclusions of law or judgment. The facts, as stipulated and found by the court to be true, omitting those that are not material on this appeal, are as follows:

Plaintiff is under contract to transport mails from the stations in St. Paul and Minneapolis to the post-offices, and in performing this contract uses a large number of automobiles. June 30, 1915, defendant issued to plaintiff its policy of insurance, by which it agreed to indemnity plaintiff against loss or damage to any of said automobiles from fire or theft, and also to indemnify plaintiff against loss from liability imposed by law for damages on account of bodily injuries, including death, by reason of the use of the automobiles, for the period of one year. As originally issued the policy did not insure against liability on account of injury to or destruction of the property of others, the printed provisions in the policy applicable to this kind of insurance being marked "void." November 9, 1915, in consideration of an additional premium, a "rider" was executed and attached to the policy. This revived the provisions of the policy so marked void, and insured plaintiff until the policy expired against loss by reason of liability imposed by law upon plaintiff for destruction of or injury to property of others

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arising from the ownership, maintenance or use of the automobiles. As the question in the case turns on the proper construction to be given a clause of this rider, we here give it:

"The company's liability * * * is limited to the actual intrinsic value of the property damaged or destroyed at the time of its damage or destruction, which shall not be greater than the actual cost of the repair or replacement thereof, and in no event in excess of the sum of one thousand ($1,000) dollars for one accident resulting in damage or destruction of property whether the property of one, or more than one, person."

November 11, 1915, one of plaintiff's automobiles collided with an automobile owned by one Brown, resulting in damage to Brown's car. Defendant paid Brown the sum of $104.90 in settlement, and took a receipt which recited that the amount was received from the insurance company and plaintiff "in full settlement and satisfaction of all claims for property damage sustained by Meyer Brown to his automobile on or about November 11th, 1915, for which it is claimed J. S. Christison is liable." Then followed this: "It being expressly understood and agreed between the parties hereto, that Meyer Brown does not release any other claim for damages growing out of said accident by reason of depreciation in the value of his said automobile or by reason of his loss of the use of the same while being repaired."

In February, 1916, Brown brought an action against plaintiff to recover $200, alleged to be his loss by reason of depreciation in the value of his car on account of the accident, and the same amount for the loss of the use of the car while it was being repaired. Plaintiff immediately notified defendant of the bringing of this action and demanded that it undertake the defense thereof. Defendant declined, and plaintiff defended the action, which resulted in a verdict of $100 in favor of Brown and against plaintiff herein. Under the charge of the court in the case referred to, the recovery was for depreciation in the value of the car by reason of the accident, over and above the amount paid Brown by defendant. Judgment was entered on the verdict for $114.30 and was paid by plaintiff. It is to recover the sum so paid, with $65 attorney's fees incurred, that the present action was brought.

The amount paid by defendant insurance company to Brown, $104.90, was the amount of the charges made against Brown by mechanics for

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work, labor and material done and furnished upon the car and made necessary by the collision.

The decision of the trial court that plaintiff was not entitled to recover in this action was based upon the quoted condition of the policy that the company's liability "is limited to the actual intrinsic value of the property damaged or destroyed * * * which shall not be greater than the actual cost of the repair or replacement thereof." Plaintiff contends that, notwithstanding this limitation, defendant is liable for depreciation in the value of the automobile caused by its having been in a collision. This depreciation in value is over and above the cost of all repairs that it is possible to make. A car that has been in an accident that makes repairs necessary depreciates in value, although all broken or damaged parts are repaired or replaced and the car is apparently as good as ever. At least this was the basis of Brown's recovery in his suit against plaintiff, and is conceded to be the fact. The receipt given by Brown for the payment of the bill for repairs by the insurance company shows quite clearly what the question is, but is of little importance otherwise, save as it indicates that the question was left open.

We appreciate that the question is important, though the amount involved is small. Counsel for plaintiff argue that the policy promised indemnity from liability imposed by law upon the assured for the destruction of or injury to the property of others, and that the limitation clause should be construed liberally so as not to defeat recovery for liability imposed by law for all injury to the property of others. It is clear enough that Brown's car was injured over and above the cost of the repairs made. It is also clear that this injury could not be remedied by repairs, but it was nevertheless an injury to Brown's property for which the law imposed liability upon plaintiff. But for the limitation clause there would be no doubt of the liability of the insurer. Was it intended by the limitation clause to preclude liability when the insured was compelled to pay for injuries that could not be remedied by mechanical repairs? Is this clause so free from ambiguity that it is necessary to so construe it? To repair an automobile means to restore it to a sound or good state after injury or partial destruction, to restore it to its original condition. "Replacement" has much the same meaning, but as used would seem to refer to cases where property is destroyed rather than

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merely damaged, where repairs only will not restore it to its original condition. But there are many articles of property which are never again of the same value after injury and repair. It would be often impossible to restore a damaged article to its original condition by repairing it. It was not possible to make Brown's car as good as it was before it was damaged. But all was done that was possible to this end, without buying him a new car. The members of the court are divided in their opinions as to whether the decision of the trial court is sound. The writer thinks that under the clause providing that the liability of the insurer is limited to the actual value of the property damaged or destroyed, "which shall not be greater than the actual cost of repair or replacement thereof," defendant is not liable beyond the amount actually paid by Brown for repairs to his car. A majority of the court thinks that this is too narrow a construction of the language of the limitation clause, that, where there are damages to the property that are not and cannot be fully remedied by repairing it, there is a liability for the full loss, limited of course by the money limit specified. We have found no authorities that are helpful, and were cited to none. The view of a majority of the court leads to a reversal.

Judgment reversed, with directions to amend the conclusions of law in accordance with this opinion, and to enter judgment in favor of plaintiff for the amount claimed.

BROWN, C. J.

I concur in the view of Mr. Justice Bunn.

JOHN H. THOORSELL v. CITY OF VIRGINIA.[1]

July 20, 1917.

Nos. 20,406—(197).

Municipal corporation — unguarded hole in pavement — liability of city.

In this action to recover for injuries sustained by plaintiff from tripping and falling in a hole in a city street, it is *held:*

[1] Reported in 163 N. W. 976.

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(1) The evidence justified a finding that defendant was negligent in not guarding or lighting the hole at night.

(2) Plaintiff was not guilty of contributory negligence as a matter of law and the evidence sustains the finding of the jury that he was not.

(3) The damages are not excessive.

Action in the district court for St. Louis county to recover $10,000 for personal injuries. The answer among other matters alleged that defendant is a municipal corporation subject to the terms of chapter 84 A, G. S. 1913, and acts amendatory thereof, known as the Workmen's Compensation Act; that the plaintiff herein was an employee of one John Mesberg in defendant city; that the injury complained of was received in the course of and arising out of his said employment; that said John Mesberg and the plaintiff herein were both subject to the terms of that act. The case was tried before Hughes, J., who denied defendant's motion for an instructed verdict, and a jury which returned a verdict for $2,500. Defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

S. S. Dahl, City Attorney, and *Montague & Montague,* for appellant.

Archer & Pickering, for respondent.

BUNN, J.

Plaintiff recovered a verdict of $2,500 for the injuries received in the accident involved in this case. Defendant appeals from an order denying its motion for judgment non obstante, or for a new trial.

The usual questions were argued, negligence, contributory negligence, damages. The following is an outline of the facts as the jury was justified in finding them:

Central avenue, one of the principal streets in the defendant city, has a bithulithic pavement. September 10, 1915, a piece of this pavement was taken up to enable a property owner to install a water pipe. The hole thus made started about 6 feet from the westerly curb, extended 6 feet towards the middle of the street, was 2 feet in width, and 4 inches deep. The slab of paving material taken out was placed on a strip between the street and the sidewalk. From September 10 to September 17, the hole was protected by a railing and by red lights at night. The work of install-

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ing the water pipe was completed at the last named date, the city filled the hole with sand and gravel, and took away the railing and lights. The slab of paving material was not replaced, the object of this being to allow the fill in the hole to thoroughly settle before the concrete base and bithulithic cap were replaced. This condition continued until the evening of October 19, 1915, the time of the accident.

Plaintiff resided in a flat on Central avenue nearly opposite the point where this hole was. Shortly after 6 o'clock in the evening of October 19, he was being taken to his home on the rear seat of a motorcycle driven by a fellow employee. When opposite the flat the motorcycle slackened its speed to 2 or 3 three miles an hour, and plaintiff stepped off on the left-hand side with his face toward the wheel. He turned around and had taken 3 or 4 steps in the direction of the flat when he stepped into the hole in the pavement, fell and sustained serious injuries. The evidence, while conflicting, would warrant a finding that the hole was 4 inches deep at this time. It was dusk, and plaintiff did not see the hole or think of its being there.

1. We are of the opinion that the question whether the city was negligent in permitting this hole in the street to remain unguarded and without warning lights at night was, on the evidence, for the jury to decide, and that we ought not to disturb its decision that the city was guilty of a breach of its duty to the people using the street. No question of notice to the city of the defect is involved. We do not say that defendant was negligent but simply that the question was one for the jury to pass upon, and that its decision is not so manifestly wrong as to warrant our setting it aside after the trial court has approved it. It is not difficult to see how such a hole in the pavement of a busy street might be a danger to persons traveling along it, especially after dark. The evidence was that the loose dirt and gravel placed in the hole when the barrier and light were taken away, was constantly being thrown out by passing vehicles, was replaced from time to time, but that at the time plaintiff met his accident the depression was something like 4 inches. Before the hole was filled the city recognized that it was dangerous and placed barriers and lights there. It would seem to have been hardly less dangerous after the loose material was filled in.

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Counsel for defendant claim that, as the hole was some 40 feet from the corner crossing and as there were good sidewalks on both sides, the city had no reason to anticipate that the part of the street where the hole was would be used by pedestrians, and therefore was under no obligation to guard or light it for their benefit. This assumes that pedestrians have no right to use the street outside of the sidewalks except at crossings. We are unable to hold this. It is not in accord with the authorities or with common sense. As said by the trial court in its charge to the jury, it is true that the use of the street outside of the sidewalk is primarily for traffic by teams and other vehicles, and the use of the sidewalk primarily for pedestrians, but pedestrians still have the right to use the street when the necessity arises. It has never been held, to our knowledge, that they have not such right, or that the duty of a municipality to use reasonable care to keep the streets in a safe condition does not extend to making them reasonably safe for pedestrians who have occasion to be upon that portion of the street ordinarily traveled by vehicles. The question has been generally one of whether it was contributory negligence per se for a pedestrian to cross a street at a place other than a regular crossing, and it has quite uniformly been held that it was not. The same authorities are conclusive on the question of whether the city owes any duty to the pedestrian except to keep its sidewalk and crossings safe. Collins v. Dodge, 37 Minn. 503, 35 N. W. 368; 2 Notes on Minn. Reports, 1132.

2. It is not so clear that plaintiff was guilty of a want of ordinary care contributing to the accident that we feel justified in saying either that it is conclusive that he was, or that the verdict is not sustained by the evidence.

As to plaintiff's use of this portion of the street, instead of using the crossing, in addition to Collins v. Dodge, supra, and the authorities cited in the note to this case above referred to, the cases everywhere are quite unanimous that the question is one of fact. The following cases, cited by counsel for plaintiff, are in point: Raymond v. City of Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57; Baker v. City of Grand Rapids, 111 Mich. 447, 69 N. W. 740; Finch v. Village of Bangor, 133 Mich. 149, 94 N. W. 738; Finnegan v. City of Sioux City, 112 Iowa, 232, 83 N. W. 907; City of Louisville v. Haugh, 157 Ky. 643, 163 N. W. 1101. It is clear also that the degree of care required of plaintiff was ordinary care. Of course

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in determining whether he used ordinary care, all the circumstances are to be considered.

It is contended that plaintiff was negligent because he had knowledge that the hole was there. He probably did have such knowledge, though only in the same way that any resident on a street has knowledge of its defects. He did not have the existence of the hole in mind, when after alighting from the motorcycle he started for the flat building where he lived. This is not at all surprising or unusual, and it is almost elementary that the fact that he had such knowledge does not charge plaintiff with contributory negligence as a matter of law. It is hardly necessary to refer to authorities on this point, but we cite Maloy v. City of St. Paul, 54 Minn. 398, 56 N. W. 94; 3 Notes on Minn. Reports, 1020. Considering all the evidence as to how the accident happened we think a verdict either way would have to be sustained.

3. We are unable to say that the damages were excessive. We will not refer in detail to the injuries received by plaintiff. If the jury accepted plaintiff's version of them, how they occurred, the pain, the fracture of the thigh bone and the permanent shortening of the leg, as the evidence justified it in doing, the award made was not palpably in excess of fair compensation.

Order affirmed.

EDGAR STEVENS v. G. T. VELDE.[1]

July 20, 1917.

Nos. 20,414—(221).

Adverse possession — mistake as to boundary.

In an action of ejectment a verdict was directed in favor of the defendant claiming title by adverse possession of a strip adjoining his farm occupied by him under a mistake as to the true boundary line. Title may be acquired by adverse possession though the occupancy is under a mistake as to boundary. The usual elements of adverse possession must exist and the evidence in proof of it must be clear and con-

[1]Reported in 163 N. W. 796.

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vincing. Upon an examination of the evidence it is *held* that the question of adverse possession was one of fact and the direction of the verdict was error.

Action in ejectment in the district court for Yellow Medicine county. The answer alleged adverse possession since 1889. The case was tried before Daly, J., who denied plaintiff's motion for a directed verdict and granted a similar motion by defendant. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Reversed.

Bert O. Loe, for appellant.

Paul D. Stratton, for respondent.

DIBELL, C.

Action of ejectment. The court directed a verdict for the defendant. The plaintiff appeals from the order denying his alternative motion for judgment or a new trial.

The plaintiff is the record owner of the northeast quarter of a certain section in Yellow Medicine county. The defendant is the owner of the southeast quarter. In determining his northerly line the defendant started at the east quarter corner and went westerly to what he supposed was the center of the section but reached a point some 5 or 6 rods north of it. The result was that he occupied a wedge-shaped piece of land on the south of the plaintiff's quarter running to a point at the southeast corner of it. This is the land in dispute and the defendant claims it by adverse possession. In 1892 this land was under plow, except perhaps a swale which passed somewhat westerly of the northeast corner, and most of it had been broken 2 or 3 years before, and it has been in use since. The defendant had at the time a contract of purchase. In 1894 he sold but bought back in 1897. In the interim he occupied as tenant.

There is evidence that in 1906, though the date is in dispute and is claimed by the defendant to be some years later, the plaintiff plowed to the true south line of his quarter and to that extent interfered with the defendant's possession. The following year the defendant seeded the land which the plaintiff had plowed and has used it since. The evidence is indefinite. The question of the effect of the plowing is not much discussed in the briefs. Upon another trial it may or may not be important.

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See 1 Cyc. 1009, et seq.; 2 C. J. § 113, et seq.; 1 Am. & Eng. Enc. (2d ed.) 835, 1 R. C. L. 723; 1 Cent. Dig. Adverse Possession, §§ 234, 235; 1 Dec. Dig. Id. § 47.

It is clear that the defendant went into possession by mistake. He thought he was on his own quarter and was not intending to claim land other than that which his contract included. To constitute possession adverse so that it ripens into title it must be actual, open, exclusive, continuous for the statutory period, and with a hostile and adverse intent, that is, with the intention of claiming and appropriating it. These elements must coexist. 1 Dunnell, Minn. Dig. §§ 113, 114. The evidence must be clear and convincing. 1 Dunnell, Minn. Dig. § 127. It is not necessary that the adverse possessor believe that he is the owner in fact. It is enough if he intends to disseize the true owner and appropriate the land. Carpenter v. Coles, 75 Minn. 9, 77 N. W. 424; Cool v. Kelly, 78 Minn. 102, 80 N. W. 861; Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127; Rupley v. Fraser, 132 Minn. 311, 156 N. W. 350; Cain v. Highland Co. 134 Minn. 430, 159 N. W. 830. There must be an adverse intent. The occupant may acquire title by adverse possession though he enters and occupies under a mistake as to the boundary line, supposing he is on his own land. 1 Dunnell, Minn. Dig. § 114b, and cases. The usual elements of adverse possession must exist. Adverse intent must be present as in other cases.

Usually the question whether the elements essential to adverse possession exist is one of fact. Rarely can a verdict be directed for the adverse claimant. There may be a case where the occupant of land beyond his own under a mistake as to boundary is conclusively shown to have acquired title by his possession. The facts before us do not make such a case. A finding of adverse possession would be easily sustained. The question was not one of law and the verdict should not have been directed.

Order reversed.

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EMMA HAVLICEK v. WESTERN BOHEMIAN FRATERNAL ASSOCIATION.[1]

July 20, 1917.

Nos. 20,417—(210).

Mutual benefit insurance — advancing money to pay assessments — no question of waiver.

1. An officer of the local lodge of the defendant association from time to time, at the request of the insured, advanced assessments coming due and paid them to the association. He did not assume to overlook or excuse defaults but advanced money to avoid them. He made similar advances for others. No assessments were advanced by the local lodge for the insured nor did it consent to noncompliance with the constitution of the association. It is *held* that the evidence made no question of waiver for the jury either through the conduct of such officer or of the local lodge.

Same — notice of amount due — not a waiver.

2. Prior to the death of the insured, and when he stood suspended from the benefits of insurance because of a failure to pay assessments, the officer of the local lodge sent him a statement of amounts due, which included amounts which he had advanced him, with a notice that they must be paid by a specified day, prior to which day the deceased died. The day specified was the day on which a third unpaid assessment would result in a suspension by the provisions of the constitution. This notice was not one required by the constitution. It is *held* that its effect was not to recognize the insured as in good standing, with insurance in effect until the day specified, and that it did not, alone or in connection with other acts, constitute a waiver by the company.

Same — no reinstatement of insured by attempted payment.

3. On the night before the day when deceased died, and when he stood suspended, though subject to reinstatement in the manner provided by the constitution, a check for the amount of his unpaid assessments was sent by another in his behalf by mail to the financial secretary. The latter received it after the death of the insured, refused to accept it, and returned it to the sender. It is *held* that such sending and receipt of the check did not work a reinstatement of the insurance.

[1]Reported in 163 N. W. 985.

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Same — local secretary not an incompetent witness.

4. The financial secretary of the local lodge was not an incompetent witness because of G. S. 1913, § 8378, forbidding one interested in the event of an action from testifying to conversations with or admissions of a deceased.

Same — documentary evidence admissible.

5. There was no claim of payment of certain accrued assessments except by the check referred to in paragraph 3 preceding. In view of this there was no prejudicial error, if any at all, in receiving in evidence one of the books of the defendant showing the standing of the deceased relative to the payment of dues and assessments.

Action in the district court for Scott county to recover $1,000 upon defendant's policy of insurance upon the life of Frank J. Havlicek. The case was tried before Converse, J., of the First Judicial district, who granted defendant's motion for a directed verdict. From an order denying her motion for a new trial, plaintiff appealed. Affirmed.

E. W. Komarek and *F. J. Leonard,* for appellant.

Joseph Mekota and *Arthur J. Phil. Jelinek,* for respondent.

DIBELL, C.

Action on a policy of life insurance. The court directed a verdict for the defendant. The plaintiff appeals from the order denying her motion for a new trial.

1. The defendant is a fraternal insurance company. It issued a policy upon the life of Frank J. Havlicek. The plaintiff, his wife, was the beneficiary. He died on February 17, 1916. At that time the assessment due on December 1, 1915, and which might be paid without a default as late as December 28, 1915, and the like assessment due January 1, 1916, were unpaid. By the constitution the effect of the nonpayment by the twenty-eighth of the month when due was to suspend the insured from all insurance benefits. The insured was formally suspended in December for the nonpayment of the December assessment and notice was given to the supreme lodge.

The plaintiff claims that the defendant waived prompt payment and the consequent forfeiture. This claim is based upon the conduct of the financial secretary. He, from time to time, upon the prior request of the

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insured, advanced his assessments. This was a private arrangement. The secretary did not excuse or overlook defaults nor assume to take assessments after insurance benefits were suspended. The sums which he advanced were paid to the association. In some respects the facts are similar to those disclosed in Chandler v. Royal Highlanders (Neb.) 162 N. W. 642, and Haycock v. Sovereign Camp, 162 Wis. 116, 155 N. W. 923, in each of which the arrangement was held to be between the member and the officer and not of a character charging the order.

The question of waiver here urged is not at all like that in the following cases, cited by the plaintiff, where it was claimed that the acts of the local lodge constituted a waiver and the question was held one of fact for the jury: Mueller v. Grand Grove U. A. O. D. 69 Minn. 236, 72 N. W. 48; Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728; Sauerwein v. Grand Lodge, O. S. H. 121 Minn. 229, 141 N. W. 174; Dougherty v. Supreme Court I. O. F. 125 Minn. 142, 145 N. W. 813. Nor is it like the question of waiver in Elder v. Grand Lodge A. O. U. W. 79 Minn. 468, 82 N. W. 987, and Graves v. Modern Woodmen, 85 Minn. 396, 89 N. W. 6, cited by the defendant, where it was held that the acts of an officer of the local lodge in extending indulgences did not constitute a waiver by the order. In these cases there were indulgences granted and defaults condoned either by the local lodge or one of its officers. Here there was neither. The secretary did not overlook or excuse defaults but advanced money to a member so that he might avoid a default. The evidence recited made no question for the jury of a waiver by the association of payment by the twenty-eighth of each month or of the forfeiture resulting from nonpayment.

2. On February 14, 1916, the secretary sent to the insured a notice of the amount owing by him which apparently included sums which he had advanced, and the notice stated that the amounts must be paid by the twenty-eighth of the current month. He was at the date of the notice formally suspended for the nonpayment of the December assessment and by the terms of the constitution the nonpayment of the January assessment had resulted in a suspension of benefits. The day specified was the day on which insured would be suspended because of the failure to pay the February assessment. This notice was not required by the constitu-

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tion. Its effect was not to recognize the insured as in good standing with insurance in effect until the date stated in it. Bowlin v. Sovereign Camp, 82 Minn. 411, 85 N. W. 160. It was not a waiver of the forfeiture and suspension. At the time insurance benefits were suspended in accordance with the constitution because of the failure to pay when due, although the insured might be relieved of the effect of the suspension by reinstatement within three months from his suspension in the manner provided by the constitution.

3. The insured died at one o'clock in the morning of February 17, 1916. The night before a check covering his delinquencies, together with the amounts advanced him by the financial secretary, was mailed in his behalf to the secretary. This was in response to the notice mentioned in the preceding paragraph. It was received by the secretary, apparently in regular course of mail, after the death of the insured. He declined to accept it, and at once returned it. The constitution provides that dues or assessments sent by mail shall not be considered received before they reach the secretary. At the time of the mailing of the notice the insured was suspended from benefits. Upon payment of defaults and under certain conditions he was entitled to reinstatement. The provision of the constitution upon these matters is this:

"Art. 58. Any member, who shall fail to pay his mortuary assessment by 9 o'clock p. m. of the 28th day of each month will become on that day suspended from all the benefits of life insurance and his benefit certificate will become null and void and remain so until the suspension is abrogated.

Art. 59. A suspended member may be reinstated to all of his rights and privileges within three months from the date of his suspension if he shall deposit with the financial secretary the assessment and all following assessments due until the day when he desires to be reinstated. The lodge shall at the next meeting take a vote and decide by a majority of all present members if such suspended member shall be reinstated and if the vote is affirmative, the President shall declare him reinstated, and after such declaration and not before the financial secretary shall enter the assessments paid by such suspended member into the column of receipt and re-enter the name of such member in the list of members

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in good standing and will report such reinstatement immediately to the supreme office, stating the day on which such reinstatement took place; the secretary shall make a record of this in the minutes of the meeting."

The tender or payment of delinquent dues after the death of the insured would not work a reinstatement of the insurance. Brown v. Knights, 43 Colo. 289, 96 Pac. 450; Rice v. Grand Lodge, 103 Iowa, 643, 72 N. W. 770; Brown v. Grand Council, 81 Iowa, 400, 46 N. W. 1086; Carlson v. Supreme Council, 115 Cal. 466, 47 Pac. 375, 35 L.R.A. 643; Butler v. Grand Lodge, 146 Cal. 172, 79 Pac. 861; Thompson v. Fidelity Mut. L. Ins. Co. 116 Tenn. 557, 92 S. W. 1098, 6 L.R.A.(N.S.) 1039, 115 Am. St. 823; Supreme Lodge v. Jones, 35 Ind. App. 121, 69 N. E. 718; Miller v. Union Cent. L. Ins. Co. 110 Ill. 102; Regan v. Prudential Ins. Co. 33 Misc. 78, 67 N. Y. Supp. 197; Campbell v. Supreme Lodge, 168 Mass. 397, 47 N. E. 169; Bennett v. Sovereign Camp (Tex. Civ. App.) 168 S. W. 1023. These cases illustrate various situations and involve different insurance contracts, but upon principle they are substantially controlling. The deceased was in default. He had been formally suspended from insurance benefits. The report of his suspension had been transmitted to the supreme lodge as required by the constitution. He had not applied for reinstatement and he was not reinstated. There is no evidence that the association waived reinstatement or that a payment after suspension was treated as working a reinstatsment. The defendant waived nothing and was not estopped to insist upon the forfeiture. The situation is distinguished from that involved in Prudential Ins. Co. v. Union Trust Co. 56 Ind. App. 418, 105 N. E. 505.

4. The secretary of the company was permitted to testify as to conversations with the deceased. It is claimed that this was error because of G. S. 1913, § 8378, which forbids a person interested in the event of an action giving in evidence conversations with or admissions of deceased persons. In Bost v. Supreme Council R. A. 87 Minn. 417, 92 N. W. 337, we held that an officer similarly situated was not so directly interested that he was within the prohibition of the statute, and we follow the ruling. See also Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022. The case is distinguished from Peterson v. Merchants Ele. Co. 111 Minn. 105, 126 N. W. 105, 534, 27 L.R.A.(N.S.) 816, 137 Am. St. 537, where a stockholder

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of a corporation was held so directly interested that he could not testify.

5. There was no prejudicial error, if any at all, in the receipt in evidence of the book of the defendant showing payments of dues and assessments. The verdict would have been the same without it. On the whole record there was no question that the December and January dues were unpaid unless the giving of the check on February 17, considered in a preceding paragraph and held not to be a payment, was such.

Order affirmed.

DIOCESE OF ST. PAUL v. CITY OF ST. PAUL.[1]

July 20, 1917.

Nos. 20,426—(226).

Cemetery — private cemetery — exemption from local assessment.

Calvary cemetery is owned and operated by the Diocese of St. Paul, a religious corporation. No plat of the property was ever filed for record as required by G. S. 1913, § 6316. The city of St. Paul levied a special assessment against the lands comprising the cemetery for the construction of a sewer along one side of the property. It is *held*:

(1) The Diocese is not a public cemetery association, the statutes relative to the establishment of cemeteries by such associations, the conduct thereof, and the exemption of their lands from taxes and assessments, do not apply. The laws that do apply are those relative to the establishment of cemeteries by private persons and religious corporations. Under G. S. 1913, §§ 6316, 6317 and 6323, the lands comprising such a cemetery are not exempt from assessments for public improvements unless the requirements of the statute are substantially complied with. The omission to record a plat, as required by section 6316, was a substantial failure to comply with the statutory requirements, and prevents holding that the cemetery was laid out and dedicated as required by the statutes, and that the lands are exempt from assessment.

(2) It does not appear that the assessment in question cannot be collected in the usual course out of lands of the cemetery not in use for burial purposes.

(3) In determining that the lands comprising the cemetery were benefited by the improvement, it is not shown that the common council made a demonstrable mistake of fact, or applied an erroneous rule of law.

[1]Reported in 163 N. W. 978.

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The Diocese of St. Paul, owner of Calvary cemetery, filed objections in the district court for Ramsey county in the matter of the application of the city of St. Paul for confirmation of an assessment for the construction of a sewer on Front and other streets. The matter was heard before Brill, J., who overruled the objections and ordered judgment in favor of the city. From the judgment confirming the assessment, objector appealed. Affirmed.

O'Brien, Young & Stone, for appellant.

O. H. O'Neill and *John A. Burns,* for respondent.

BUNN, J.

This matter is before the court on an appeal by the Diocese of St. Paul from the judgment of the district court for Ramsey county confirming an assessment against the real estate comprising "Calvary Cemetery" for the construction of a sewer extending along the side of the property.

Appellant's chief claim is that the property is exempt from assessment under the statutes of this state. It also contends that the finding of the trial court that the sewer in question was or might be a benefit to the property is not sustained by the evidence.

Calvary cemetery was established two years before Minnesota was admitted into the Union. It comprises 97½ acres, is inclosed by a fence, and is laid out and platted into blocks, lots, streets and alleys. The Diocese of St. Paul owns the land and conducts the cemetery, which is, in the number of burials, perhaps the largest in St. Paul. The Diocese is a religious corporation organized under the laws of this state in 1883, and has since owned the property and used it for burial purposes exclusively. The ownership prior to the incorporation of the Diocese does not appear. The cemetery is used for the burial of persons of the Catholic faith, though members of other churches or nonchurch members, who are connected with families who are members of the Catholic church and have lots in the cemetery, are permitted burial there. The Diocese, by an instrument in writing, for a certain consideration, grants to its patrons the exclusive right of burial in the lots, subject to the rules, regulations and restrictions made at the time of the grant or which may thereafter be made for the government of Catholic cemeteries in the Diocese, and it agrees to keep the lots so granted in good order and condition without further charge.

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A plat of the property, showing the lots and streets, and upon which the lots and blocks were numbered, was prepared and has been in use by the Diocese for some years. It does not appear that there was any certificate of a surveyor upon or attached to the plat, and it has never been filed or recorded in the office of the register of deeds. Nor does it appear that there is any stone or monument marking the corner of the cemetery.

The learned trial court based its decision that the property was not exempt from assessment upon this failure to file and have recorded a plat of the property, certified as correct by the surveyor making it, and designating a monument which must be placed at one corner of the property, all as provided by the laws governing cemeteries established by a private person or a religious corporation.

These laws are now found in G. S. 1913, § 6316, et seq. Section 6316 provides that "any private person and any religious corporation may establish a cemetery on his or its own lands in the following manner." Then follow the provisions as to a survey and plat, which shall be filed for record with the register of deeds. Section 6317 provides that when such plat has been recorded every donation or grant of lands thereon to the public or to a religious corporation shall be deemed a conveyance of such lands; that every conveyance of such lots shall be exclusively for burial purposes, and the lands designated on the plat as streets, alleys, ways, commons, or other public uses shall be held by the owner of the cemetery in trust for the uses and purposes thereon indicated. Section 6318 provides that any religious corporation, or two or more together, may acquire by gift or purchase the cemetery lands and property of any cemetery association or private cemetery. Section 6323 provides that all lands, not exceeding 100 acres in extent, so laid out and dedicated as a private cemetery, shall be exempt from public taxes and assessments.

1. If this statute applies, and it quite clearly does, the conclusion is unavoidable that the lands comprising Calvary cemetery were never "so laid out and dedicated as a private cemetery," and that there is no exemption from assessments. Prior to 1903, sections 3130 to 3135, G. S. 1894, applied only to the case where "any person desired to establish a cemetery upon any lands owned by himself." By Laws 1903, p. 83, c. 63, the powers and privileges granted by the named sections of the 1894 statutes were granted to religious corporations and the sections made to

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read substantially as they appeared in R. L. 1905, § 2690, et seq., and as they appear now in G. S. 1913, § 6316, et seq., above quoted from. It thus appears that until 1903 a religious corporation was not authorized by name to establish a cemetery under this statute.

Appellant concedes that it has not complied with the statute in that it has not filed for record a plat as provided in section 6316. It claims that notwithstanding this, the cemetery has been dedicated as such, is subject to the conditions and restrictions imposed by the statute, and should be entitled to its benefits and exemptions. We regret that we are unable to adopt this view. Section 6323, which creates the exemption, says explicitly that all lands "so laid out and dedicated as a private cemetery" shall be exempt from public taxes and assessments. This must mean "laid out and dedicated" in accordance with the preceding sections. It cannot mean a common law or "de facto" dedication. The legislature has prescribed definitely what is necessary to constitute a dedication of lands as a private cemetery. Among these requirements is the one which requires a plat of the property to be recorded, stating the blocks, lots, streets and the location of the monument to mark one corner of the cemetery. We fail to see how the omission to comply with this requirement can be regarded as unimportant, or overlooked. The legislature had an object in view, and one not difficult to see. It was undoubtedly considered important to have the records show lands that were exempt from taxes, assessments and sale on execution, especially when they did not show by the name of the owner that the lands were devoted to cemetery purposes.

The appellant in this case is not a public cemetery association, so as to come within the provisions of G. S. 1913, § 6268, et seq., and so as to make its "lands and property exempt from all public taxes and assessments."

In State v. City of St. Paul, 36 Minn. 529, 32 N. W. 781, it was held that under G. S. 1878, c. 34, § 259, which is the exemption provision which corresponds to the present provision found in G. S. 1913, § 6286, the lands and property of cemetery associations are exempt from assessments for local improvement. The above section of the 1878 statute construed in that case exempted only "the cemetery lands and property of any association formed pursuant to this title," that is, those of public

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cemetery associations. In City of St. Paul v. Oakland Cemetery Assn. 134 Minn. 441, 159 N. W. 962, the only question involved or decided was that section 6286, G. S. 1913, was constitutional. Neither case is in point here, save as they indicate the policy of the court to uphold the legislature in exempting burying grounds from assessments, and to construe with some liberality such acts as the legislature may pass with that end in view. There can be no doubt, as stated by Mr. Justice Holt in the case last cited, "that public policy, from territorial times to the present day, has always favored the exemption of public burying grounds from taxes and assessments." But there can also be no doubt that the legislature must create the exemption; it cannot be done by the court.

We do not understand counsel for appellant to claim that Calvary is a public cemetery. They rather claim that all cemeteries, save those conducted by a governmental agency, are private, and that we have in this state two kinds of private cemeteries: First, those owned by a cemetery association; and, second, those owned by a private person or religious corporation. This is true in a sense, and a cemetery operated by a religious corporation may be as much a public one as is a cemetery operated by a cemetery association, except that in the first case burials are in the main restricted to those of the faith of the religious corporation, while in the second case there is no restriction of this kind. But the point is that the legislature has seen fit to enact one set of laws for cemeteries owned and conducted by associations organized for that purpose, and another set of laws for cemeteries owned and conducted by private persons or religious corporations. And there can be not doubt that the appellant in this case come under the second set of laws. It is quite clear that section 6286 does not apply. This section exempts only the lands and property of "public cemetery associations" existing at the time the act went into force or thereafter organized. It is hardly claimed that the Diocese of St. Paul can be called a public cemetery association. It is plainly a religious corporation with many activities other than conducting a cemetery. Further, there are many provisions of the public cemetery law which appellant has not and could not comply with. We have already noted that the statutes make a clear distinction between cemetery associations operating a public cemetery, and individuals or religious corpora-

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tions that maintain cemeteries, either for profit, or for the burial of those of a particular religious faith. Appellant must be in one class or the other, and there can be no doubt that it is in the second class.

2. Appellant claims exemption from assessments, on the ground that the city could not enforce its lien by sale. If we are correct in holding that appellant does not come within the statutes governing "public" cemeteries, and has not complied with the statutes governing "private" cemeteries, we find no statute exempting the lands composing the cemetery from a sale to satisfy the assessment. It would be unthinkable that land actually in use for burial purposes should or could be sold, but we are not advised that the assessment could not be collected from lands of the cemetery not so in use. It will be time enough to consider this question when it arises if it ever does. In this connection it is proper to note that we see no reason why appellant cannot still comply with the law, and thereafter have its cemetery lands exempt from assessment.

3. It is claimed that the assessment should not stand for the reason that it is conclusive that the property is not benefited by the sewer. The common council determined that it was. No evidence on the question was produced on the trial. We are not able to say that there was a demonstrable mistake of fact or that an erroneous rule of law was applied.

Judgment affirmed.

FRED L. STEVENS v. BESSIE PEARSON.[1]

July 20, 1917.

Nos. 20,432—(189).

Bills and notes — fraud — notice of fraud to indorsee — evidence.

Defendant gave to the Donald-Richard Company an order in writing for certain goods and at the same time signed a promissory note at the bottom of the order, detachable from the order by an indistinct perforation. It is virtually conceded that the note was procured by fraud. Plaintiff is an indorsee of the note. There is evidence sufficient to sustain a finding that plaintiff was chargeable with notice of the fraud and that defendant was not negligent in signing the note.

[1]Reported in 163 N. W. 769.

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Action in the district court for Ramsey county to recover $100 upon a promissory note. In her answer defendant alleged that the salesman of Donald-Richard Company specifically stated that defendant would not have to pay for any goods unless sold, and relying on such representation defendant agreed that the goods might be placed in her store to be sold and paid for according to such agreement. She denied that she ever signed any promissory note whatsoever and if her signature appeared upon the note it was obtained by fraud and trickery, and she never intended to sign any note; that the note was absolutely without consideration and void. She also alleged that plaintiff was not a bona fide purchaser of the paper. The case was tried before Hanft, J., who at the close of the testimony denied motions for directed verdicts, and a jury which returned a verdict in favor of defendant. Plaintiff's motion for judgment notwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Keller & Loomis, for appellant.

John A. Pearson, for respondent.

HALLAM, J.

Plaintiff brings this action as indorsee of a "detached" note given by defendant to the Donald-Richard Company. The note was dated July 27, 1915, was payable in instalments of $25 each in 4, 6, 8 and 10 months after date, and was indorsed over to plaintiff under date of October 13, 1915. Defendant contends that the note was obtained by fraud of one Hussey, the agent of the Donald-Richard Company, and it is conceded that if Hussey "made the representations that defendant claims were made to her, * * * then he practiced fraud upon her" and defendant "would not be liable to the Donald-Richard Company." That he did make the representations claimed by defendant is not denied.

This leaves only the question whether, under the negotiable instrument law, plaintiff has a better right of recovery than his transferror.

Fraud, in procurement of a signature to a promissory note, may consist of a trick or artifice by which a person is induced to sign the note without knowledge of the fact that it is a note, as where the paper is folded in such manner as to conceal its true nature. A note procured by fraud of this

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character is not a contract at all, for there is no real assent on the part of the signer and it is wholly void and acquires no vitality, even in the hands of an innocent purchaser for value, unless the signer is guilty of some negligence, and in such event the liability to the innocent purchaser is predicated on negligence or estoppel and not on original assent. This is common law doctrine. G. S. 1913, § 6015, embodies this doctrine and perhaps enlarges it.

On the other hand, fraud may consist of misrepresentation which induces a real assent to the note, so that the party understands that he is signing just the contract that he does sign. A note obtained by fraud of this character has some vitality. There has been a meeting of the minds. The note is subject to the defense of fraud, but it is voidable only. In the hands of a bona fide holder for value the defense of fraud is not available. In an action on a note so procured, the question of negligence is not an element.

The court instructed the jury in substance, that section 6015 of the statute applied to this case, that, though defendant proved the fraud alleged, still if she was negligent in signing this paper, she had no defense against plaintiff, and then also instructed them that in no event was the defense of fraud available if plaintiff took the paper without notice or knowledge of the fraud.

This was perhaps a more favorable instruction than plaintiff was entitled to. It was if the evidence brought the case within the statute, for in such case, in the absence of negligence of the signer, the bona fides of the holder does not avail him. But this fact is not of great importance on this appeal, for, whatever may be said of the character of the fraud in this case, we are of the opinion that the evidence is sufficient to sustain a finding that plaintiff was chargeable with notice of the fraud and that defendant was not negligent.

The fraud charged was that Hussey induced defendant, who is a milliner conducting a small store, to order a line of toilet articles with the understanding that she was to pay for them only as sold, and if they did not sell or were not satisfactory, the company would take them back, and that Hussey induced defendant to sign what was apparently only an order, but which in fact was an order with a note at the bottom with the paper perforated in such a way that the note could be detached.

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It would be uncharitable to Hussey to charge the fraud wholly or even mainly to him. The whole framework of the document presented to defendant to sign was manifestly designed to enable agents to perpetrate the very fraud which Hussey in fact committed. The contract is long, on a large yellow sheet, and in fine print. Conspicuous at the start is this: "Special Agreement" of the seller: "We hereby agree to buy back at the purchase price all of the goods in this order remaining on hand at the termination of this agreement, if purchaser so desires." The time of termination of the agreement is not fixed. Hussey paraphrased this language but very little. The document is on its face designated an "order" for goods subject to "approval" of the seller. It fixes the terms of payment at 4, 6, 8 and 10 months and gives "privilege of cash discount" of 6 per cent on maturity of first payment. It is at the bottom of this that the instrument in form a promissory note is found. It is part of the sheet on which the order is printed and is separated from it by means of an indistinct perforation. On casual inspection it might look more like a continuation of the contract and a specification of the terms of payment under it, than a promissory note. Just above the "perforation" in fine print is the language "the attached note is tendered in settlement of this order and the company is authorized to detach same when this order is approved and shipped." The places intended for signature are such as to confuse. Defendant's name appears twice at the foot of the order, once written by herself, once by another, as well as at the bottom of the note.

If the whole of the yellow sheet is read closely it will be seen that the detachable portion is a promissory note, but it will be seen also that the note is out of harmony with the rest of the "order," so much so that one who had made the agreement would hardly give such a note except by inadvertence, and so much so that if this action had been brought by the payee, the defense that defendant had not sold the articles and desired to return them, would be perfectly available. The value of the note is accordingly largely in its detachment and transfer. The form of the document is well calculated to aid a salesman in securing from a customer a promissory note which he does not consciously give. In fact, it is not easy to see any purpose in incorporating this detachable note into the contract, except a purpose to deceive.

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Plaintiff was a lawyer of many years' experience. He had taken thousands of dollars worth of these notes before. He knew they were detached from contracts. The taking of these notes was regular business with him, and, as they were collected, the proceeds were deposited in a special fund and this fund he used to take over more notes. He left the notes in the hands of the company's attorney for collection. There had been a considerable number of suits. The company paid all expense of collection and of the litigation incident to it.

Fraud in the inception of the note having been proved, it rested with the plaintiff to prove that he was a purchaser in good faith and for value. G. S. 1913, § 5871; Bank of Montreal v. Beecher, 133 Minn. 81, 157 N. W. 1070. We think the evidence presents facts abundantly sufficient to put plaintiff on inquiry and to charge him with notice of the fraud perpetrated on defendant.

As to the alleged negligence of defendant in signing her name to this note, we need only say that we think the average intelligent milliner of small business experience, with this document before her, complicated and contradictory in its terms, would find difficulty in understanding its legal effect and might easily be led into signing her name, as defendant did, without realizing that she was putting afloat a negotiable promissory note. The books abound in cases where courts have relieved parties from the terms or provisions of contracts which by reason of fine print or other device are easily susceptible of being overlooked or not understood by the party bound by them. Insurance Co. v. Slaughter, 12 Wall. 404, 20 L. ed. 444; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701. Caution should be exercised in affording such relief, but we think the evidence in this case is such that the jury might find that defendant was not negligent in signing this note and that she was not bound by it.

Order affirmed.

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STATE EX REL. CHARLES SIMON v. DISTRICT COURT OF BLUE EARTH COUNTY AND ANOTHER.[1]

July 20, 1917.

Nos. 20,575—(254).

Bastardy — change of venue.

A prosecution under the statute relating to bastards is triable in the county in which the mother of the child resides, and the defendant is not entitled to have the place of trial changed therefrom to the county in which he resides.

Upon the petition of Charles Simon, the supreme court ordered the district court for Blue Earth county and Honorable Willard L. Comstock, judge thereof, to show cause why a peremptory writ of mandamus should not issue to respondents to transfer the action entitled State v. Charles Simon from that court to the district court for Le Sueur county. Order discharged.

E. W. Komasek and *Moonan & Moonan,* for relator.

S. B. Wilson and *John W. Schmitt,* County Attorney, for respondents.

TAYLOR, C.

Upon the complaint of Mary Schaak Trinka, the relator was bound over to the district court of Blue Earth county for trial upon the charge that he was the father of her illegitimate child. He applied to that court for a change of venue to the county of Le Sueur on the ground that he resided in that county. His application was denied, and thereupon he applied to this court for a writ of mandamus commanding the district court to change the venue to the county in which he resided.

The question presented is whether the statutes providing for a change of venue of civil actions apply to proceedings under the bastardy statute.

The prosecution authorized by this statute is a purely statutory proceeding, unknown to the common law; and is in form a criminal prosecution, but in substance a civil action. Repeated decisions have thorough-

[1]Reported in 163 N. W. 797.

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ly established that it is governed by the rules of civil procedure, "so far as they are applicable." The statute is not as specific in some respects nor as full and complete as we might wish when considering some of the questions arising under it. Unlike the statutes of many states, it contains no express provision as to the county in which the trial shall be had, and the rules for determining the place of trial of civil actions would apply in the absence of provisions indicating a different intent on the part of the legislature. State v. Longwell, 135 Minn. 65, 160 N. W. 189.

The statute with the change in phraseology made in the revision of 1905 is found in the General Statutes of 1913, §§ 3214-3226, inclusive. Section 3214 provides for the arrest of the accused on the complaint of the mother. Section 3215 provides for a preliminary examination. Section 3216 provides that, at any time before the trial in the district court, the defendant may secure his discharge upon certain conditions. These are: That he shall pay, or secure to be paid, to the mother such sum as she, with the written approval of the county board or of the county attorney and chairman of the county board, may agree to accept; that he "shall also pay the costs of prosecution and the expenses incurred *by such county* for the lying-in and support of and attendance upon the mother during her sickness;" and that a "bond be given to *the county,*" approved by the designated county officers, "conditioned to indemnify *such county* against all charges for the maintenance of the child." Before the revision of 1905, this section expressly provided that the bond should be given "to the commissioners of the county *in which such female resides,*"[1] and no change in this respect was intended by the revision. Section 3217 provides that the defendant shall be bound over to the "district court of the *proper county*" for trial if there be probable cause to believe him guilty, and he has not already secured his discharge under section 3216. Section 3219 provides that, if he is found guilty at the trial in district court, the court shall adjudge him to be the father of the child and charge him with its maintenance. Section 3220 provides that "the person so adjudged to be the father of such child shall give bond to *the county* approved by the court, for the performance of such judgment and order, and also for the payment of all expenses incurred by *the county* for the lying-in and support of, and attendance upon, the mother during her sickness, and for the care and support of such child

[1] [G. S. 1914, § 2041.]

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prior to the giving of such bond. If he fails to give such bond and to pay the costs of prosecution, he shall be committed to the county jail, there to remain until he complies with such order or is discharged as provided by law." Section 3221 provides that after he has been imprisoned for 90 days he may apply to the court to be released from imprisonment on the ground that he is unable to comply with the judgment, and that a hearing shall be had thereon, "of which the petitioner shall give at least ten days' notice to the complainant, if a resident of the state, and to *said county board.*" Section 3223 provides: "The mother of such child, or *such county board,* at any time after the defendant is discharged, may recover of him by action any sum of money which ought to have been paid pursuant to such judgment." Section 3224 provides: "If any woman is delivered of a bastard child which is, or is likely to become, a public charge * * * the *county board of the county where she resides,* or any member thereof, may apply to a justice of the peace of the county to inquire into the facts." Section 3226 provides that "the *county board,* either before or after judgment," may make a compromise and settlement with the defendant.

We think that the effect of these several provisions is to require the case to be tried in the district court of the county in which the mother resides. This seems to have been the construction uniformly given to the statute ever since its enactment, and so far as we are aware this is the first time that such construction has been questioned. Authority to initiate the proceeding in behalf of the public is given only to the county board, or a member thereof, of the county in which the mother resides; and if a proceeding initiated by the mother be settled, the county in which she resides is the county to which the bond to secure the support of the child must be given. The context indicates that the same county is referred to throughout the statute, and the expressions, "the county," "such county," "proper county," "said county," found in the various sections of the act cannot well be construed otherwise than as meaning the county in which the mother resides. It follows that the district court ruled correctly, and defendant's application is denied and the order to show cause discharged.

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H. SHRAIBERG v. ARNOLD HANSON AND OTHERS.[1]

July 27, 1917,

Nos. 20,358—(98).

Vendor and purchaser — equitable title of vendee — specific performance — recording act — burden of proof — party to appeal.

The defendant Stusse on September 13, 1912, sold his farm to the defendant Hanson for $12,000, received part payment, executed a contract of sale, and put him in possession. Hanson on June 4, 1914, sold to the defendant Feldman for $17,000, of which $5,000 was paid by a transfer of merchandise, $7,000 was to be paid by the assumption of payments due Stusse, and $5,000 was to be paid in 1920. He assigned to him his contract with Stusse, executed a contract of sale which provided that the $5,000 due in 1920 should be paid before deed or be secured by mortgage, and put him in possession. Feldman assigned his interest to the plaintiff Shraiberg on June 13, 1914. The contract between Stusse and Hanson and Hanson's assignment to Feldman were recorded on June 9, 1914. The assignment from Feldman to the plaintiff was recorded on June 15, 1914. The contract between Feldman and Hanson was recorded on July 13, 1914. The plaintiff seeks specific performance without paying or securing the $5,000 due in 1920. He claims that he is a bona fide purchaser of an equitable title without notice of the contract relative to securing the $5,000 and that he is protected by the recording act. *Held*:

(1) The vendee in a subsisting contract of sale has an equitable title; and by the transaction recited Hanson acquired the equitable title and Stusse retained the legal title as security.

(2) The assignment of June 4, 1914, conveyed Hanson's equitable title to Feldman. The contract of the same date charged Feldman's title with payment of the $5,000 due in 1920. The assignment of June 13, 1914, conveyed Feldman's title to the plaintiff and was recorded prior to the recording of the contract of June 4, 1914. The recording act embraces equitable titles. The plaintiff, if a bona fide purchaser from Feldman, is protected against the earlier executed but later recorded contract pledging the farm as security for the payment of the $5,000 due in 1920.

(3) The burden of proving that he was a bona fide purchaser within

[1]Reported in 163 N. W. 1032.

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the recording act was upon the plaintiff, and the evidence does not sustain a finding that he was.

(4) The defendant Hanson and his wife are the only appellants. Feldman was not served with the notice of appeal, but he filed a brief as respondent and appeared in this court and is bound by the result reached.

Action in the district court for Martin county for specific performance. The facts are stated in the opinion. Among other matters the separate answer of Arnold Hanson alleged that the assignment from Feldman to plaintiff was executed with intent to cheat and defraud said Hanson. The case was tried before Quinn, J., who made findings and ordered judgment in favor of plaintiff. From an order denying their motion to amend the findings of fact and conclusions of law or for a new trial, defendants Arnold Hanson and Lucy Hanson appealed. Reversed.

Knox & Faber, for appellants.

Haycraft & Palmer and *Albert R. Allen,* for respondent.

DIBELL, C.

This is an action by the plaintiff H. Shraiberg against the defendants John Hanson, M. L. Feldman, Arnold Hanson and Lucy Hanson, his wife, for the specific performance of a contract for the sale of real estate. There were findings for the plaintiff. The defendants Hanson and wife appeal from the order denying their motion for a new trial. The defendants Stusse and Feldman do not appeal. Feldman filed a brief, designating himself respondent, and appeared in opposition to the defendants who appealed.

On September 13, 1912, the defendant Stusse was the owner of a quarter section farm in Martin county. On that day he sold it to the defendant Hanson for $12,000, of which $500 was paid in cash, $4,500 was to be paid on March 1, 1913, and the balance of $7,000 was represented by mortgages either then existing and to be assumed or afterwards to be executed. The usual contract was executed. Hanson and wife entered into a written contract dated June 4, 1914, and delivered June 6, 1914, with the defendant Feldman for the sale of the same property for $17,000, of which $5,000 was then paid by the transfer of merchandise, $7,000 was to be paid as provided in Hanson's contract with Stusse,

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and $5,000 was to be paid on January 1, 1920, with 6 per cent annual interest. The contract provided in effect that Feldman, before getting a deed, should pay the $5,000 due in 1920, or secure it by a mortgage on the property. As a part of the transaction Hanson assigned to Feldman his contract with Stusse and delivered to him the original which had not been recorded. Feldman recorded both of these on June 9, 1914, but did not record his contract with Hanson. On June 13, 1914, he assigned his contract with Hanson to the plaintiff Shraiberg. This assignment was recorded on June 15, 1914. The contract between Hanson and Feldman, which apparently was in duplicate, was recorded by Hanson on July 13, 1914. Prior to the commencement of this action Stusse conveyed to Hanson and the latter is able to give title.

On this chain of title Shraiberg, having tendered the amount due on the Stusse contract but not the sum of $5,000 due in 1920 under Feldman's contract with Hanson, and without giving security for it, asks specific performance. A decree to that effect was directed and the contract between Hanson and Feldman was ordered canceled. The result is that Hanson has the personal obligation of Feldman for the $5,000 agreed to be paid in 1920; but it is not secured upon the land as it was provided in the contract that it should be unless paid before deed.

1. The vendee in a subsisting contract of sale gets an equitable title and the vendor retains the legal title as security. By the transaction recited Hanson acquired an equitable title and Stusse retained the legal title as security. Minneapolis & St. L. Ry. Co. v. Wilson, 25 Minn. 382; Smith v. Lytle, 27 Minn. 184, 6 N. W. 625; Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056, 3 L.R.A. 739, 12 Am. St. 736; Wilson v. Fairchild, 45 Minn. 203, 47 N. W. 642; Abbott v. Moldestad, 74 Minn. 293, 77 N. W. 227, 73 Am. St. 348; Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156. The interest of Hanson was real estate. It would pass by descent. Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212. It was subject to dower. Wellington v. St. Paul, M. & M. Ry. Co. 123 Minn. 483, 144 N. W. 222; Kasal v. Hlinka, 118 Minn. 37, 136 N. W. 569. It was subject to a homestead right. Wilder v. Haughey, 21 Minn. 101; Hook v. Northwest T. Co. 91 Minn. 482, 98 N. W. 463. It was subject to the lien of a judgment and could be sold on execution. Reynolds v. Fleming,

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43 Minn. 513, 45 N. W. 1099; Hook v. Northwest T. Co. 91 Minn. 482, 98 N. W. 463. It could be mortgaged. Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369. It would pass by deed. Wilson v. Fairchild, 45 Minn. 203, 47 N. W. 642; Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156. It was such title that the owner of it could maintain an action for permanent damages for trespass. Hueston v. Mississippi & R. R. Boom Co. 76 Minn. 251, 79 N. W. 92.

2. The assignment of June 4, 1914, conveyed the equitable title from Hanson to Feldman. Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156. The contract of the same date had like effect as a transfer and in addition it charged the Feldman title with the payment of the $5,000 due in 1920. Feldman's assignment of June 13, 1914, conveyed his equitable title to the plaintiff Shraiberg. Feldman could not maintain specific performance without paying or securing the $5,000 for that was his contract. The plaintiff claims that he bought Feldman's recorded equitable title in good faith, without notice of the unrecorded contract charging it with the payment of the $5,000, and that he is protected by the recording act.

The recording act defines the word "purchaser" as "every person to whom any estate or interest in real estate is conveyed for a valuable consideration, and also every assignee of a mortgage, lease or other conditional estate;" and it defines the word "conveyance" as "every instrument in writing whereby any interest in real estate is created, aliened, mortgaged, or assigned, or by which the title thereto may be affected in law or in equity, except wills, leases for a term not exceeding three years, and powers of attorney." G. S. 1913, § 6813. The provision relative to recording is this: "Every conveyance of real estate shall be recorded in the office of the register of deeds of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any part thereof whose conveyance is first duly recorded * * *." G. S. 1913, § 6844.

The general rule is that equitable titles are embraced within registry laws. Wilder v. Brooks, 10 Minn. 32 (50), 88 Am. Dec. 49; McPheeters v. Ronning, 95 Minn. 164, 103 N. W. 889; 2 Devlin, Deeds, § 628; 2

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Jones, Real Property in Conveyancing, § 1374; 2 Tiffany, Real Property, § 476; Webb, Record of Title, § 36. Between the plaintiff and another, both buying from Feldman, the recording act would apply and the conveyance first of record though later in execution would be prior. Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156. The question here is whether the plaintiff buying of Feldman was protected against the unrecorded contract pledging the land as security for the $5,000. The assignment and the contract were conveyances within the definition of the statute. If Feldman, instead of evidencing his agreement pledging the land as security for the $5,000 by the contract, had given a purchase money mortgage, or had executed a defeasance, and Hanson had left it unrecorded, it would not be claimed that Shraiberg, if a bona fide purchaser, would not be protected against it. And on principle the situation is hardly different. Hanson gave Feldman a good record title to the equitable estate coming from Stusse and neglected to put of record the contract creating in him a security for the $5,000. Purchasers were not informed of it. The defendants cite Klatt v. Dummert, 70 Minn. 467, 73 N. W. 404, which was followed in Massey v. Lindeni, 98 Minn. 133, 107 N. W. 146. This case holds that the equity in a vendor in an executory contract to a reformation for mutual mistake is available against the vendee's bona fide assignee. In the opinion some general statements are made relative to the rights of an assignee of such a contract. We do not stop to inquire the extent or limits of the right to reformation for mistake when the vendee has transferred to a good faith purchaser nor the character of the rights acquired by a purchaser of a vendee in an executory contract. Here there was no mistake and the rule as to reformation has no direct bearing. The understanding between the parties was perfect and at no time has Stusse claimed an equity or a defense. All the trouble arises through the failure of Hanson to record the contract evidencing his security. The situation was just this: Hanson had a recorded equitable title and conveyed it to Feldman. A contract was made which evidenced security in Hanson for the $5,000 due in 1920. It was not recorded. Feldman conveyed to the plaintiff Shraiberg who bought a recorded equitable title and recorded his conveyance before the contract was put of record. In such a situation we hold that the plaintiff, if a pur-

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chaser in good faith, is protected by the recording act against Hanson's claim of security.

3. The court found that the plaintiff purchased in good faith. Whether such finding is sustained by the evidence is for consideration.

The burden of proving that he purchased in good faith was upon the plaintiff. He relied upon the recording act. It gives protection to those who pay value and are without notice or knowledge. Purchasers are charged with such knowledge as an inquiry prompted by the character of the transaction would bring. The plaintiff could not rely solely upon his apparent priority. It was for him to show affirmatively his right to the protection of the statute. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965; Errett v. Wheeler, 109 Minn. 157, 123 N. W. 414, 26 L.R.A. (N.S.) 816; Fritz v. Ramspott, 76 Minn. 489, 79 N. W. 520; Mead v. Randall, 68 Minn. 233, 71 N. W. 31; Roussain v. Patten, 46 Minn. 308, 48 N. W. 1122.

On June 6, 1914, the transaction between Feldman and Hanson was closed. On June 9 Feldman recorded the Stusse and Hanson contract, which was delivered to him by Hanson at the time, and the assignment made to him. On June 11 he went to Chicago, the deal with the plaintiff was made on June 12, and he was back in Minnesota on the thirteenth when he executed the assignment to the plaintiff. This he recorded on June 15. The plaintiff is the father-in-law of Feldman and the brother of one M. Shraiberg. The arrangement for the transfer of the Feldman interest is claimed to be something like this: On August 15, 1913, M. Shraiberg sold to Feldman a stock of merchandise, a portion of which was included in the stock transferred to Hanson. To evidence the unpaid purchase price and a loan of $1,000 made at the time Feldman gave Shraiberg five notes of $800 each and one note of $1,000, due yearly in from one to six years. On the back of the notes was an indorsement signed by Feldman to the effect that they were given in part payment of merchandise, and that in the event of his failure to pay them they should evidence an interest of the holder in his business. When the parties met in Chicago the plaintiff, H. Shraiberg, signed these notes and Feldman transferred the land to him. The indorsements on the back of the notes supposed to give M. Shraiberg a lien or some interest in the event of nonpayment were stricken out. It is not clear whether H. Shraiberg

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was merely a surety or whether his obligation was primary. He speaks in language indicating that he was surety. Feldman says that he was himself released. Shraiberg never saw the land, was never in Minnesota, and never owned lands in this country. He was 10 years over from the old country and did not understand nor speak, nor read, nor write English. He was engaged in the commission business in Chicago, and owned real property there. He did not personally or otherwise examine the land. The transaction was closed in a very few hours after it was proposed, without the passing of money, with a vague understanding as to what obligation the plaintiff assumed, between men connected by family ties, all of whom had been and were at the time engaged in mercantile pursuits, and none of whom had ever farmed or dealt in farm lands. It is not shown that the plaintiff has paid any part of the notes. Two had matured at the time of the trial. It does not appear that he parted with any money because of his purchase. His testimony is vague as to the collection of rents and as to expenditures. He does not know what he has received or what he has paid. After the purchase he did not look at the farm. His connection with it has been through relatives. His testimony was given by deposition. We cannot believe that he assumed immediate liabilities of $5,000, and others aggregating $7,000, in a few hours after the subject was broached to him, and is unable to give a substantial account of what the real transaction was. It will be noticed that Feldman was transferring property coming to him for $17,000 to the plaintiff for apparently $12,000. Feldman claims that Shraiberg assumed some other obligations. They are undisclosed. H. Shraiberg does not, in giving his account of the transaction, say there were others. Neither does M. Shraiberg. Feldman could not commit a fraud on Hanson by depriving him of security for the $5,000 except through the intervention of a bona fide purchaser. The evidence discloses a not unusual situation where one in an effort to complete a fraud by transferring to an innocent purchaser makes use of a relative whose assumed connection with the transaction is not genuine. We are constrained to hold the evidence insufficient to sustain a finding that the plaintiff was a bona fide purchaser.

4. The defendant Hanson and his wife are the only appellants. Stusse conveyed to Hanson prior to this action. He is not a necessary party. Feldman did not appeal. His answer is not on file. What issues it makes

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or are made upon it we do not know. Hanson did not serve the notice of appeal upon Feldman. This should have been done if it was desired to bind Feldman by the adjudication in this court. Atwater v. Russell, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26. However, he filed a brief in which he designated himself as respondent and he appeared in this court. He is bound by the result. Akin v. Lake Superior C. I. M. 103 Minn. 204, 114 N. W. 654, 837. Whether Feldman is a necessary party does not appear; but from what is said it will be understood that when the case goes down for retrial the position of Feldman in it will be as it was at the first one.

Order reversed.

Mr. Justice Quinn, having tried the case below, took no part.

LEWIS H. VATH v. JOSEPH WIECHMANN AND ANOTHER.[1]

July 27, 1917,

Nos. 20,361—(178).

Sale — fraud.

1. This is an action on promissory notes. The defense is that the notes were given as purchase price on a sale procured by fraud. There is evidence sufficient to raise an issue that misrepresentations were made and that defendants suffered damage therefrom.

Evidence — books of account — identification.

2. Books of account of plaintiff, kept by the person in charge of his business, having every appearance of complete books of account, produced after testimony by plaintiff that he had books of account of the business and in response to a request to produce his books of account exhibited by him on other occasions as the books in which his records were kept, were sufficiently identified to be competent evidence against plaintiff.

Sale — misrepresentation of material fact.

3. A representation, in negotiations for sale, that the property has never been offered for sale for less than $5,000, when in fact an option to buy has been given for $1,400, is a misrepresentation of a material fact. Statement of opinion as to value does not ordinarily constitute actionable fraud.

[1]Reported in 163 N. W. 1028.

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Action in the district court for Stearns county to recover $2,500 upon 10 promissory notes. The case was tried before Roeser, J., who at the close of the testimony granted plaintiff's motion for a directed verdict, and a jury which returned a verdict for $2,000. From an order denying their motion for a new trial, defendants appealed. Reversed.

J. B. Himsl and *R. B. Brower,* for appellants.

Donohue & Stephens and *J. D. Sullivan,* for respondent.

HALLAM, J.

Plaintiff was the proprietor of a commercial school in Watertown, South Dakota. He sold the school and its equipment to defendant Joseph Wiechmann for $5,000. Joseph gave notes for the amount signed by himself and defendant Frank H. Wiechmann. Plaintiff brought suit on some of these notes. Defendants answered alleging that the sale was induced by fraud and also that he broke his contract in one particular. Other defenses are alleged but they are not important. At the close of the testimony the court directed a verdict for plaintiff on plaintiff's agreeing to allow the damages claimed for breach of contract. In other works, the court held that there was no proof for submission to the jury on the question of fraud. Defendants appeal.

1. We think the court erred. The proof of fraud may not have seemed satisfying to the court. It is not strong. In a letter written by defendant Joseph long after the fraud, if any, should have been discovered, he made no mention of the fraud and talked of paying the notes. We think, however, this was not conclusive against defendants and that there was some evidence of fraud and of damages which should have been submitted to the jury.

On the case made, there was evidence of fraud on the following points:

There is evidence that plaintiff represented that 70 students were enrolled in the school for nine months, and that this was not true.

There is evidence that plaintiff represented that the gross receipts of the school were $5,000 a year and the net profits $2,000. There is evidence that these statements were untrue.

These were representations of material facts, there is evidence that defendants acted on them, and if untrue, the jury might have allowed damages for the fraud.

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2. The evidence as to the untruthfulness of these statements is mainly the alleged books of account of plaintiff. It is quite clear that, if these books are a true record of plaintiff's business, they furnish evidence that the above representations made were untrue. The court held that the books had "not been identified as being such records as ought to bind Mr. Vath." They did not, of course, conclude plaintiff but we think they were sufficiently identified to be evidence against him. The books consisted of a receipt book, blotter, journal and ledger. They were kept by plaintiff's wife. She had charge of the school. Her testimony was not available to defendants for the purpose of identifying them. While plaintiff was on the stand he testified that he had books of account of the school and was asked to produce them. These were the books he produced. He said that as far as he knew they were all of the books of account. They were the books he claimed to have exhibited to defendant Joseph for his inspection when he bought the school, and plaintiff testified that he then told defendant they were "the set of books we kept" and "the books of the school that we kept our records." They were received in evidence without objection. It is true plaintiff tried to discredit the books. They may not have been correct or complete. Even the proprietor of a commercial school may not keep correct books, but we think it fairly appears that these were the regular books of account kept in plaintiff's business and that they were competent evidence against plaintiff.

3. We think too that the alleged representation that the plaintiff had never offered the property for less than $5,000, if it was made, and if as claimed by defendants an option had been given for the sale of the property for $1,400, was a misrepresentation of a material fact. On this point we are impressed with the reasoning in Stewart v. Lester, 49 Hun, 58, 1 N. Y. Supp. 699.

If the representations of fact were true, the alleged representations of value were mere statements of opinion and did not constitute actionable fraud, within the rules well recognized in this state. See Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244; Adan v. Steinbrecher, 116 Minn. 174, 178, 133 N. W. 477; Brody v. Foster, 134 Minn. 91, 92, 158 N. W. 824, L.R.A. 1916F, 780.

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We impress the fact that this sale was never rescinded and that defendants' right to relief depends on his proof of fraud and damages resulting therefrom.

Order reversed.

WILLIAM LEIBEL v. MICHAEL GOLDEN AND OTHERS.
JOHN LEIBEL v. SAME.
JOSEPHINE LEIBEL v. SAME.
CARRIE LEIBEL v. SAME.[1]

July 27, 1917,

Nos. 20,435, 20,436, 20,437, 20,438—(215, 216, 217, 218).

Assault and battery.

In an action against four defendants for an assault the evidence is *held* insufficient to justify submitting to the jury the claim of a conspiracy. The charge in submitting such claim was prejudicially erroneous as to two of the defendants, who were not conclusively shown to have participated directly in the alleged assault or as aiders or abettors; but as to the other two defendants, who actively participated, and who confessedly were either justifiably defending themselves or were the aggressors, and who were by the general verdict of the jury found to be the aggressors, it was not prejudicial for it did not affect the question of their liability nor the amount of damages to be awarded.

Four actions in the district court for Anoka county. William Leibel, as father of a minor son, claimed $1,000 damages. John Leibel claimed $11,150; Josephine Leibel, $500 and Carrie Leibel, $1,500. The cases were tried together before Giddings, J., who when plaintiffs rested and at the close of the testimony denied separate motions of defendants to dismiss the actions and separate motions by defendants for directed verdicts, and a jury which returned verdicts in favor of respective plaintiffs for $50, $1,500, $10 and $100. From an order denying their motion for new

[1]Reported in 163 N. W. 991.

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trials, defendants appealed. Affirmed as to defendants George Golden and Joe Golden and reversed as to defendants Michael Golden and Jack Golden.

Will A. Blanchard and Young, O'Brien & Stone, for appellants.

Hall & Tautges, for respondents.

DIBELL, C.

Four actions for assault, tried together, in each of which Michael Golden, George Golden, Jack Golden and Joe Golden were the defendants. In one John Leibel was the plaintiff, in another William Leibel, as father of Reuben Gordon Leibel, a minor, in another Josephine Leibel, and in the other Carrie Leibel. In each there was a verdict for the plaintiff against all of the defendants. The defendants appeal from the order denying a motion made on behalf of each for a new trial.

The court submitted the cases to the jury upon the theory of a pre-existing conspiracy to commit an assault as well as upon the theory of the commission of an assault by the defendants jointly or separately. The important question is whether there was evidence justifying the submission of the claim of conspiracy.

The Leibels and Goldens were neighbors living on their farms in Anoka county. The alleged assault took place at a nearby school house at the close of a school election on the night of July 18, 1914. In the school house unfriendly words passed between Josephine Leibel and Michael Golden. On the outside, as the people assembled were leaving, there was a spirited quarrel between Josephine Leibel and Agnes Golden who was a sister of Joe Golden and a niece of Michael Golden. This quarrel had some connection with the talk between Mrs. Leibel and Mike Golden in the school house. The men folks at once became champions and a fight resulted. In it John Leibel received injuries which the jury were justified in finding so severe as to warrant substantial damages. The injuries to the other three were slight. George and Joe were active participants. They claim that John Leibel was the aggressor and that they did no more than they might rightfully do in self-defense. The jury found on sufficient evidence that they were the aggressors. The evidence was such as to sustain a finding that Michael Golden aided and abetted so that he was chargeable as a participant and was jointly liable with the others. It

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did not require such a finding. There was substantial evidence that he took no part except as a peacemaker. The evidence was such as to justify a finding that Jack Golden aided and abetted and thereby became a participant and a joint tort feasor. It did not require such a finding. There was evidence sufficient to relieve him from liability.

If the case had been submitted to the jury solely upon the theory that all who aided and abetted at the time were joint participants in the wrong and liable for the result the verdict would be sustained. It was, however, submitted upon the theory that a conspiracy might be found; and that if there was a conspiracy all were liable for what any one did. Upon this theory the jury could have found Michael Golden and Jack Golden liable though they did not aid or abet or assist in the actual assault. Therefore if the evidence is not such as to sustain a finding of conspiracy there was error. An examination of it brings us to the conclusion that a finding of conspiracy is not sustained.

There was evidence that a feeling of unfriendliness had existed between the families for years; that there had been recent trouble over a roadway; that the defendant Michael had made loose threats or assertions suggesting violence, and that the families were of opposing factions at the school election which perhaps engendered some ill feeling. There was not much more. It is fairly clear that the quarrel between Mrs. Josephine Leibel and Miss Agnes Golden was the immediate occasion of the disturbance. The defendants had no express or implied understanding that they were to fight the plaintiffs or any of the Leibels. The quarrel of these two women precipitated a fight of the men of their families. They at once took up the quarrel and were immediately at blows. The fight was characterized by sudden impulse and spontaneity rather than by the pre-arrangement, planning or forethought which a conspiracy implies. We find no evidence, even circumstantial, substantially supporting the claim that there was a plan, arrangement or understanding essential to constitute conspiracy. We hold that it was error to submit the claim of conspiracy. This holding requires a new trial as to Michael Golden and Jack Golden. It does not as to George Golden and Joe Golden. These two actively participated in the fight. Either they were defending themselves or they were assaulting the Leibels. They do not claim otherwise. This was substantially the charge of the court. The jury on competent

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evidence found by their general verdict that they were the aggressors. The verdict would have been against them whether the jury found or failed to find a conspiracy. A finding of conspiracy would not subject them to a liability not resting upon them without such a finding nor enhance the damages assessed against them. They were not prejudiced by the submission of the question.

The order is affirmed as to the defendants George Golden and Joe Golden and reversed as to the defendants Michael Golden and Jack Golden.

Affirmed in part and reversed in part.

HENRY J. SAVELA AND OTHERS v. OTTO ERICKSON.[1]

July 27, 1917,

Nos. 20,441—(225).

Will — devise to members of a class.

1. Where a gift is made by will to a class of persons and immediate distribution is contemplated, the persons constituting the class are determined as of the death of the testator.

Same — when bequest is contingent.

2. Where the bequest to the class is contingent, the members constituting the class are not determined as of any time earlier than the vesting of the estate.

Same — when right of enjoyment is postponed.

3. Where a gift is to a class and the right of enjoyment is postponed, beyond the time that it vests in right, and until the termination of a preceding estate, the members entitled to take are determined as of the time when the gift to the class vests in enjoyment.

Same — amendment of final decree to protect posthumous grandchildren.

The probate court made a decree vesting in certain named persons a remainder left by will to "the grandchildren" of the testator. One grandchild had been born after the death of the testator and before the

[1]Reported in 163 N. W. 1029.

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decree. Of this fact the court had no knowledge. Another was born after the decree but before the estate vested in enjoyment in the grandchildren. The rights of these were not presented to the court and no provision was made for them. The court had power after the estate vested in enjoyment in the grandchildren to amend the final decree so as to protect the rights of these after-born children.

Irene D. R. Savela, born January 11, 1914, and Earl D. H. Savela, born April 16, 1916, by their father and guardian, Henry J. Savela, petitioned the probate court for Renville county for the correction of the final decree of that court in the matter of the estate of their grandfather, John Savela, deceased. The petition was denied. From that part of the order refusing to include the grandchildren named as heirs of said decedent and to grant them an equal share with the other grandchildren of deceased, their father and guardian appealed to the district court for that county. The appeal was heard by Daly, J., who made findings modifying the final decree of the probate court so as to grant to the grandchildren named their distributive share in the estate. From an order denying the motion of Gladys Savela and other minors, by their respective guardians, for amended findings or for a new trial, the guardians appealed. Affirmed.

Paul J. Thompson and *Harold B. Ransom,* for appellants.

Frank Clague and *Frank Hopkins,* for respondents.

HALLAM, J.

John Savela died testate November 14, 1913, leaving a widow and several children and grandchildren. By his will he gave the possession and use of all of his property to his wife Elsa for life. After her death he gave a legacy to his daughter Anna, and "all the rest and residue" to his son August, and provided that "should my son August die before the death of my beloved wife, Elsa, then and in that case I give, devise and bequeath all of the said estate * * * in the manner following: Ten ($10.00) dollars * * * to my grandchild William Alfred Martin, and all the rest and residue of the said estate to my other grandchildren, to my daughter Anna, and to my foster son, August M. Savela, to be divided among them share and share alike."

August died May 9, 1915, before his mother, so that the residuary be-

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quest to him never vested in enjoyment, and the residuary bequest to the grandchildren did become operative. On August 30, 1915, after the death of August, and before the death of his mother, a final decree was entered in the probate court. Distribution was made, taking into account only grandchildren born before the death of the testator. There were 15 of these, the children of two sons and two daughters. Eight were the children of a son Henry Savela. Two grandchildren, children of Henry Savela, were born after the death of the testator and before the death of his wife: one Irene D. R. Savela born November 11, 1914, before the death of August and before the final decree, another, Earl D. H. Savela, born April 16, 1916, after the death of August and after the final decree. The widow Elsa Savela died June 9, 1916. Thereafter a petition was filed in the probate court to amend the final decree so as to include Irene and Earl in the distribution. The probate court denied the petition. On appeal the district court granted it.

The question is, as of what time are the grandchildren entitled to take to be determined—as of the death of the testator—as of the death of August—or as of the death of the widow. If as of the death of the testator, then neither Irene nor Earl can be included. If as of the death of August, Irene but not Earl is included. If as of the death of the widow, both are included.

1. We recognize the rule that a will usually speaks as of the death of the testator. Kottmann v. Gazett, 66 Minn. 88, 68 N. W. 732; Yates v. Shern, 84 Minn. 161, 86 N. W. 1004; but there are other well settled principles of law to be considered in connection with this one.

The devise to the grandchildren is a devise to a fluctuating class. It is often stated in general terms that testamentary gifts to members of a class intend prima facie that class as it exists at the testator's death. Schouler, Wills, § 529. Where the question is whether the class as existing at the death of the testator or at some earlier time as, for example, the date of the will is intended, this rule is a satisfactory one and is generally accepted. Yates v. Shern, 84 Minn. 161, 86 N. W. 1004; Schaffer v. Kettell, 14 Allen (Mass.) 528; Matter of King, 200 N. Y. 189, 93 N. E. 484, 34 L.R.A.(N.S.) 945, 21 Ann. Cas. 412; Eberts v. Eberts, 42 Mich. 404, 4 N. W. 172. See Welch v. Blanchard, 208 Mass. 523, 94 N. E. 811, 33 L.R.A.(N.S.) 1. But where the question is whether the class as at the

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date of the death of the testator or at some later date is intended, the rule is subject to so many modifications and exceptions, that there is little left to the rule.

Where an immediate gift is made to a class and the right exists to have the property distributed at once on the death of the testator, the persons constituting the class are determined as of the death of the testator. 40 Cyc. 1475; McLain v. Howald, 120 Mich. 274, 79 N. W. 182, 77 Am. St. 597; Blain v. Dean, 160 Iowa, 708, 142 N. W. 418; Alsman v. Walters, 184 Ind. 565, 106 N. E. 879, 111 N. E. 921. Some decisions state this to be true even though distribution is postponed. Smith v. Smith, 186 Mass. 138, 71 N. E. 314; Matter of Smith, 131 N. Y. 239, 30 N. E. 130, 27 Am. St. 586; Yates v. Shern, 84 Minn. 161, 86 N. W. 1004. But if the latter proposition is applicable at all it is not applicable to facts such as are presented in this case.

2. The facts here are that at the time of the death of the testator, the interest of the grandchildren was a contingent remainder (G. S. 1913, § 6663; 2 Washburn, Real Property, § 1556; Minnesota Debenture Co. v. Dean, 85 Minn. 473, 89 N. W. 848); whether they would take at all was contingent until the death of August. On his death, the right of the grandchildren to take became vested remainder. Archer v. Jacobs, 125 Iowa, 467, 101 N. W. 195; Matter of Allen, 151 N. Y. 243, 45 N. E. 554. See Johrden v. Pond, 126 Minn. 247, 148 N. W. 112.

It is a principle quite well recognized that, where a bequest to a class of persons is contingent, the members of the class entitled to take are not determined as of the death of the testator nor as of any time earlier than the vesting of the estate, for it is not to be supposed that the testator intended that the members of the class should be fixed before it is determined that there is to be a bequest. 1 Schouler, Wills, § 532a; Hawke v. Lodge, 9 Del. Ch. 146; Estate of Cavarly, 119 Cal. 406, 410, 51 Pac. 629; Estate of Henderson, 161 Cal. 353, 119 Pac. 49. It is clear then that the grandchildren benefited are not to be determined as of the death of the testator. This settles the case of Irene, but not of Earl. We must consider his case further.

3. There is a manifest disposition in all cases where a gift to a class is not immediate and the bequest is not distributable at once, to let in those

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who become members of the class at any time before distribution is made. 1 Schouler, Wills, §§ 529, 530.

Some decisions looking for reasons, justify the rule in this manner: "Where there is no gift but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives." Folger, J., in Warner v. Durant, 76 N. Y. 133, 136. Or: "If *futurity* is annexed to the *substance* of the gift, the vesting is suspended; but if it appear to relate to the time of payment only, the legacy vests instanter." Denio, C. J., in Everitt v. Everitt, 29 N. Y. 39, 75. Phinizy v. Foster, 90 Ala. 262, 7 South. 836. In some cases it is said this rule applies to cases where there is no direct devise but the beneficiary takes by virtue of a direction to divide or convey. Benner v. Mauer, 133 Wis. 325, 113 N. W. 663; Cammann v. Bailey, 156 App. Div. 87, 141 N. Y. Supp. 41, 48. These decisions all seem to introduce distinctions over-refined, and rules difficult of application.

Many decisions hold that where there is a gift to a class, as children or grandchildren, and distribution to the members of the class is postponed, the gift vests in all members in existence at the testator's death, but so as to open and let in children who may come into existence at any time before the period of distribution. 1 Tiffany, Real Prop. § 122; 2 Washburn, Real Prop. § 1545, 40 Cyc. 1480; Doe v. Considine, 6 Wall. 458, 475, 18 L. ed. 869; Byrnes v. Stillwell, 103 N. Y. 453, 9 N. E. 241, 57 Am. Rep. 760; Dole v. Keyes, 143 Mass. 237, 9 N. E. 625; Archer v. Jacobs, 125 Iowa, 467, 478, 101 N. W. 195; Alsman v. Walters, 184 Ind. 565, 106 N. E. 879, 111 N. E. 921; Scott v. West, 63 Wis. 529, 573, 24 N. W. 161, 25 N. W. 18; Oppenheim v. Henry, 10 Hare, 441. See Minnesota Debenture Co. v. Dean, 85 Minn. 473, 478, 89 N. W. 848. We have no quarrel with this rule. The result harmonizes with the result attained by the great majority of decisions.

The fact is that, while courts differ in the line of reasoning followed, by far the greater number favor the rule that where a gift is to a class, as children or grandchildren, and the right of enjoyment is postponed beyond the time that the gift vests in right, and until the termination of a preceding estate, the members of the class entitled to take will be ascertained as of the time when the intervening estate is determined and the gift to the class vests in enjoyment. 40 Cyc. 1477; Doe v. Considine, 6

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Wall. 458, 475, 18 L. ed. 869; McArthur v. Scott, 113 U. S. 340, 380, 5 Sup. Ct. 652, 28 L. ed. 1015; Pugh v. Frierson, 221 Fed. 513, 137 C. C. A. 223; McLain v. Howald, 120 Mich. 274, 79 N. W. 182, 77 Am. St. 597; Matter of Allen, 151 N. Y. 243, 45 N. E. 554; Alsman v. Walters, 184 Ind. 565, 106 N. E. 879, 111 N. E. 921; Brewick v. Anderson, 267 Ill. 169, 107 N. E. 878; Hall v. Hall, 123 Mass. 120; Dary v. Grau, 190 Mass. 482, 77 N. E. 507; Oliver's Estate, 199 Pa. St. 509, 49 Atl. 215; Teed v. Morton, 60 N. Y. 502; Blatchford v. Newberry, 99 Ill. 11, 46; Waddell v. Waddell, 99 Mo. 338, 12 S. W. 349, 17 Am. St. 575; Chew's Appeal, 37 Pa. St. 23, 28; Devisme v. Mello, 1 Brown, C. C. 537; Hutcheson v. Jones, 2 Madd. 129; See Robertson v. Guenther, 241 Ill. 511, 89 N. E. 689, 25 L.R.A.(N.S.) 887.

This rule appeals to us as most consistent with reason and most likely to give effect to the intention of the donor. It seems to us to harmonize with the intent of the testator in this case as it may be gathered from the will. It is evident that deceased intended to treat without partiality all of his grandchildren except the one specially excepted. For example, testator's son Henry had eight children living at the time of the testator's death and these two born later. There is no apparent reason why he should wish to discriminate in favor of the eight to the exclusion of the two. We think he intended that the grandchildren in existence when his wife should die should be the objects of his bounty.

4. So much for the construction of the will. The contention is made that the decree of the probate court, which in effect excludes Irene and Earl, not having been appealed from within the time allowed by law, is final. It is true a decree of distribution made by a probate court is a decree in rem and binds infants and parties not in being. Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99. It is also generally true that if a probate decree is deliberately entered into as the result of a judicial construction of the will, with no fraud and no mistake other than an erroneous construction of law, the power of the court to amend such decree is exhausted upon the expiration of the time to appeal therefrom. Tomlinson v. Phelps, 93 Minn. 350, 101 N. W. 496; Leighton v. Bruce, 132 Minn. 176, 156 N. W. 285; Robinson v. Thomson, 137 Minn. 446, 163 N. W. 786.

On the other hand, it is settled that if the decree was obtained by fraud

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or was the result of a mistake of fact, relief may be had in equity, and it is fairly inferable from what is said in the cases cited that a decree may be amended in the probate court on the same grounds. We so hold. This covers the case of Irene. At the time of the entry of the final decree, the fact that Irene had been born was unknown to the court. No one in fact represented her and it must be said that the decree was entered under a mistaken apprehension of a very material fact.

If we follow the reason of the decisions cited, we have no trouble in finding power in the probate court to vacate the decree as to Earl. In Tomlinson v. Phelps it was said the limit of power of the court to vacate its decrees is the same as in district court, and this is the statute (G. S. 1913, § 7211), and following the decision in Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057, it was held that where the application rested upon considerations of legal right wholly, it must, under well settled rules of law, be made before the time for appeal expired, and that the statutes giving the court power to modify its judgments "for good cause shown" did not enlarge such limitation as to time, but it was distinctly stated in the last case that no decision was made as to the right of a party to be relieved from a judgment taken against him through his "mistake, inadvertence, surprise, or excusable neglect."

It has been held by this court in many cases extending over many years that the probate court has power to relieve a party from a judgment procured "through surprise, or excusable inadvertence or neglect." In re Gragg, 32 Minn. 142, 19 N. W. 651; In re Hause, 32 Minn. 155, 19 N. W. 973; Larson v. How, 71 Minn. 250, 73 N. W. 966. This may be justified under G. S. 1913, § 7490, subd. 8, or under section 7211, taken in connection with section 7786. It has never been held that application to open a decree on this ground must be made within the time limited for taking an appeal. In the Larson case, relief was granted on an application made after the time for appeal had expired. A sufficient showing has been made for relief on this ground. It would be harsh doctrine to hold that the interest of children yet unborn might be foreclosed by an erroneous adjudication with no power in the court to correct the error, when the rights of such children were not considered by the court, nor presented to the court, where all living persons interested in the distribution of the estate have interests antagonistic to them, and where there is no one

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in privity with the unborn to act for them on the principle of representation. The decree was properly vacated.

Order affirmed.

NATIONAL ELEVATOR COMPANY v. GREAT NORTHERN RAILWAY COMPANY.[1]

August 24, 1917.

Nos. 20,353—(182).

Carrier — shipment of grain — statute construed.

Section 4491, G. S. 1913, providing that "every common carrier transporting grain shall give the shipper, on request, a receipt for the number of pounds of grain received from him, and shall deliver such quantity to the consignee * * * less loss from transportation, not to exceed sixty pounds to each car" construed as it must be with section 4492, which provides for a penalty for failure to deliver the proper quantity of grain, is *held* to be a penal provision only, and it does not in any manner affect the civil liability of the carrier. This civil liability remains as at common law, save as this may be modified by other provision of statute.

Action in the municipal court of Minneapolis to recover $89.55 for failure to deliver part of a shipment of grain. Defendant offered judgment in favor of plaintiff for $63.24. The case was tried before Charles L. Smith, J., who made findings and as conclusion of law ordered judgment for $63.53. Plaintiff's motion for amended conclusions of law was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

Lancaster, Simpson & Purdy, and *Harold G. Simpson,* for appellant.

M. L. Countryman, Cobb, Wheelwright & Dille and *H. C. Mackall,* for respondent.

HALLAM, J.

Plaintiff delivered to defendant 85,086 pounds of rye for transportation from Clarissa to Minneapolis. Defendant issued to plaintiff its bill of

[1]Reported in 164 N. W. 79.

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lading for 85,086 pounds of rye. Defendant delivered in Minneapolis 81,160 pounds of rye. The trial court found "that the defendant lost in transit 3,926 pounds of rye." The value of this amount of rye was $64.55. Plaintiff filed a claim for $64.20. The court ordered judgment for plaintiff for $63.53, the value of the rye lost less 60 pounds. He found that defendant was "entitled to a credit of 60 pounds" by reason of section 4491, G. S. 1913. Sections 4491 and 4492 read as follows: 4491. "Every common carrier transporting grain shall give the shipper, on request, a receipt for the number of pounds of grain received from him, and shall deliver such quantity to the consignee or proper connecting carrier, less loss from transportation, not to exceed sixty pounds to each car.

4492. "Such carrier shall forfeit to the state, for each refusal to give such receipt, not less than ten dollars nor more than fifty dollars, and for each failure to deliver the proper quantity of grain, not less the fifty dollars nor more than one hundred dollars."

The trial court held that this statute, though penal, fixed the civil liability of the carrier as well, and the defendant so contends on this appeal. Plaintiff contends that it is purely a penal statute and does not in any way concern the civil liability of the carrier.

This statute, whether construed as regulating civil or criminal liability, or both, was not, as held by the trial court, intended to allow a credit of 60 pounds on grain actually lost by the carrier. Respondent concedes this. In its brief it says: It could not "remove or permit to be removed 45 or 60 pounds of grain. The carrier under this statute is still bound to deliver all the grain it receives." Inasmuch as the court found that defendant "lost in transit 3,926 pounds of rye," judgment should have been given for the plaintiff for the full value thereof, and the judgment must be reversed.

The real purpose of this appeal, however, is to determine what, if any, modification of common law rules of liability of carriers this statute imposes, and this question is presented by the record and has been argued at length and should be decided. The terms of the statute are not clear and resort may be had to the original enactment and to the history of the statute. These sections were originally enacted as sections 1 and 2, c. 88, p. 119, Laws 1875. They read as follows:

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"Section 1. That all common carriers doing business within this state engaged in the transportation of grain, shall, when requested, give a receipt for the number of bushels or pounds of grain delivered to them for transportation, and shall deliver the number of bushels or pounds so receipted for to the consignee thereof, * * * less the usual loss from transportation, not exceeding forty-five pounds to each car.

"Sec. 2. * * * And any such common carrier refusing or neglecting to deliver the amount of grain so receipted for to the consignee thereof * * * shall, in addition to the civil liability of such common carrier for all loss or shrinkage, except as above provided, be subject to a penalty of not less than fifty dollars, nor more than one hundred dollars, for each and every such refusal or neglect."

When the Railroad and Warehouse Commission Act was passed in 1887 (ch. 10, p 65, Laws 1887), the following was enacted as section 18c:

"Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

When the Revised Laws of 1905 were adopted, all these provisions were substantially incorporated into chapter 28. The provisions of chapter 28 as sections 2093, 2094 (G. S. 1913, §§ 4491, 4492), and the provisions of section 18c, Laws 1887, as section 1986 (G. S. 1913, § 4237).

This recital does not help much. The meaning of the original act of 1875 is obscure. The trial court was of the opinion that in the provision that the common carrier failing to deliver the amount of grain receipted for "shall in addition to the civil liability of such common carrier for all loss or shrinkage, except as above provided, be subject to a penalty," the words "except as above provided" limited the civil liability and defendant so contends, whereas plaintiff contends that it only defines the penal liability of the carrier, that it cannot qualify both the civil and penal liability and that it was intended to qualify or regulate only the latter.

A majority of the court are of the opinion that plaintiff's construction of this statute is right. That it provides only for a penalty and does not in any manner affect the civil liability of the carrier. There may be reasons for allowing this greater latitude before imposing penal liability. At any rate this seems to a majority of the court the fair construction of the statute. The provisions carried forward as G. S. 1913, § 4237, seem to

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harmonize best with this construction. The Missouri and Kansas statutes are different from ours. In terms they regulate civil liability. The decisions of the courts of those states construing those statutes are not pertinent here.

Judgment reversed.

STATE EX REL. GEORGE A. LENNON v. DISTRICT COURT OF DOUGLAS COUNTY AND OTHERS.[1]

October 5, 1917.

No. 20,597.

Workmen's Compensation Act — casual employment.

The erection of a temporary shed by defendant, upon a farm owned but not operated by him, cannot be held to be an employment within the usual course of the trade, business, profession or occupation of defendant so as to make him liable under the Workmen's Compensation Act to a person accidentally injured in such erection while casually employed.

Upon the relation of George A. Lennon the supreme court granted its writ of certiorari directed to the district court for Douglas county to review the proceedings in that court, Roeser, J., brought under the Workmen's Compensation Act by relator, as employee, against Trask H. Fezler, as employer. Affirmed.

Ralph S. Thornton, for relator.

Gunderson & Leach, for respondents.

HOLT, J.

Certiorari to review a judgment of the district court disallowing a claim made by relator under the Workmen's Compensation Act. The undisputed facts are, in substance, these: The defendant owned a farm near the village of Osakis, Minnesota. When the accident, upon which relator bases the claim, happened, defendant did not operate the farm but

[1]Reported in 164 N. W. 366.

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had it rented to a tenant who expected to soon take possession. Defendant lived in the village mentioned, "where he was dealing in horses, had a livery and auto livery business on a small scale and also did some auctioneering, and dealing in real estate," presumably as agent. Fire had destroyed the barn on the farm shortly before the accident to relator, and it was necessary to provide some temporary shelter for the tenant's stock. Early on the tenth of October, 1916, defendant called on relator and asked his assistance in constructing a shed for the purpose stated, informing him that he needed another man, in addition to the two carpenters and help he already had, to finish the work that day. Relator went with defendant and four other men to the farm and began to erect a temporary shed, 16 feet by 30 feet, which they would have completed that day but for a delay occasioned by a break down of the wagon on which the needed lumber was being brought to the premises. Relator and the two other carpenters were therefore requested to come back the next day to finish the shed and also to build a small chicken house. The work would not require the entire day. They came as requested, and about noon, when relator was assisting in boarding up the chicken house, he struck a nail in such a manner that it flew up and hit one of his eyes, practically destroying its vision. When relator was requested to come to work nothing was said as to the amount of his compensation. Upon these facts the court found that the employment of relator was casual only and was not in the usual course of the trade, business, profession or occupation of defendant, hence denied compensation.

The findings as to the casual character of the employment are not challenged, but it is claimed that the work came within the usual course of the business, trade, profession or occupation of defendant and that therefore under the decision of State v. District Court of Rice County, 131 Minn. 352, 155 N. W. 103, the injury is covered by the act notwithstanding the casual character of the employment.

It was part of defendant's business as a landlord, it is argued, to erect or repair the necessary structures on the farm, no matter what other trades or businesses he also might be engaged in. In support of this contention relator cites Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031. However, that case turned upon the question whether a person employed to repair a tractor, used on a ranch, was excluded

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from the benefits of the act by a clause reading like the one in our statute. A recovery was denied, and, in the opinion, the court suggested arguendo that, had the injury been received in the building of a barn on the ranch which would have become a part thereof and generally useful only for ranch purposes, the result as to compensation might have been different from the one then arrived at, for the court says a tractor is an instrumentality useful for many things not connected with a ranch. Thompson v. Twiss, 90 Conn. 444, 450, 452, 97 Atl. 328, L. R. A. 1916E, 506, is relied on. The principal contentions there were whether the claimant was an employee and whether the employment to clear and develop the defendant's lands was casual. The finding that it was not casual, grounded on evidence that the claimant had entered upon a work requiring weeks to complete, was sustained. The court also found that the development of the land was one of the businesses of the defendant, "not evidently his main business, and yet a very substantial one." The decision is not of much weight here for both the facts and the statutes are dissimilar. There is here no finding to the effect that constructing this cheap temporary shed was any substantial part of the business of defendant, either as a landlord or as a farmer. Nor do we think the evidence would authorize such a finding. The Connecticut law is in the phraseology of the English act and provides that the employee shall not be construed to include "one whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business." Our act contains this clause: "Nor shall the provisions of this act apply to actions or proceedings to recover damages or compensation for personal injuries sustained by domestic servants, farm laborers, or persons whose employment at the time of the injury is but casual and not in the usual course of the trade, business, profession, or occupation of his employer."[1]

The words "usual course" must be regarded as more restrictive than the language employed in the Connecticut and English acts. This is the view taken by the California courts in London & Lancashire G. & A. Co. v. Industrial Acc. Com. 173 Cal. 642, 161 Pac. 2, and La Grande Laundry Co. v. Pillsbury, 173 Cal. 777, 161 Pac. 988. Assuming that the lease obligated defendant to erect a shelter for his tenant's stock, or that

[1][G. S. 1913, § 8202.]

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he had voluntarily agreed so to do, we may say, in a certain sense, that the erection became his business or duty. But that cannot be the meaning of the word "business" in this statute. It must have the same general significance with respect to the work or calling of the employer as the words trade, profession, or occupation, hence must refer to the employer's ordinary vocation and not to every occasional, incidental, or insignificant work he may have to do. When we speak of a person's trade or profession we generally refer to that branch of the world's activities wherein he expends his usual everyday efforts to gain a livelihood. There is no evidence that defendant made it a part of his calling to rent out farms or erect buildings, either temporary structures or permanent. For all that appears this was the only farm he owned, and it may have been of such small area and value that its renting and care could not properly be classified either as a business or occupation. And certainly neither the renting of the farm nor the construction of this shed can be referred to as coming within the "usual course" of defendant's business or occupation.

Even the English act has been so construed that the facts of this case would not warrant compensation. It is said to afford compensation for injuries received only in the normal operations which form the part of the ordinary business carried on, and not to include incidental and occasional operations having for their purpose the preservation of the premises and appliances used in the business. Hayes v. S. J. Thompson Co. 6 B. W. C. C. 130; Rennie v. Reid, 1 B. W. C. C. 324; Pearce v. London & S. W. Ry. Co. 82 L. T. R. 487; Bargewell v. Daniel, 98 L. T. R. 257; Kelly v. Buchanan, 47 Ir. L. T. R. 228; Alderman v. Warren, 9 B. W. C. C. 507.

The supreme court of Illinois, in construing the clause "the usual course of trade, business, profession or occupation of the employer" in Uphoff v. Industrial Board, 271 Ill. 312, 315, 111 N. E. 128, L.R.A. 1916E, 329, held that an injury received by a workman hired by a farmer to erect a broom-corn shed on his farm was not received in the usual course of business of the employer. The Illinois act differs from ours in that an employee is excluded from the benefits of the law if the employment is casual, *or* if the injury did not occur in the usual course of the employer's trade, etc. But the meaning of the latter clause is not af-

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fected by the conjunction which serves merely to show the relation to what precedes.

We see no grounds upon which this court can disturb the finding of the trial court that relator's employment was casual and not in the usual course of the trade, business, profession or occupation of defendant.

Affirmed.

STATE EX REL. LYNDON A. SMITH v. PROBATE COURT OF COUNTY OF ST. LOUIS AND ANOTHER.[1]

October 5, 1917.

No. 20,600.

Inheritance tax — cost of tombstone an administration expense.

The expenditure by an executor, with the approval of the probate court, of a reasonable sum to provide a suitable tombstone upon the grave of the deceased, is an expense of administration of the estate, and the amount so expended is not subject to an inheritance tax under G. S. 1913, § 2271.

Upon the relation of Lyndon A. Smith, Attorney General, this court granted its writ of certiorari directed to the probate court for St. Louis county to review the proceedings in that court, Gilpin, J., determining the amount of the inheritance tax in the matter of the estate of William T. Bailey, deceased. Affirmed.

Lyndon A. Smith, Attorney General and *Egbert S. Oakley,* Assistant Attorney General, for relator.

Baldwin, Baldwin & Holmes, for respondents.

HALLAM, J.

William T. Bailey died testate leaving an estate inventoried at $58,601.45. He left surviving a widow, the sole beneficiary under the will. The sum of $7,000 was allowed by the probate court, without

[1]Reported in 164 N. W. 365.

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testamentary provision therefor, for the erection of a tombstone upon the grave of deceased. The probate court treated this as an expense of administration and not a part of the estate subject to inheritance tax. The state asks a review of the ruling upon certiorari. It claims this amount is subject to taxation.

We agree with the probate court. The statute imposes a tax upon "any transfer of property * * * when the transfer is by will." G. S. 1913, § 2271. It does not impose a tax upon money used to pay expenses of administration. There is no question as to the reasonableness of the amount expended for the tombstone, and the question in the case is this: Is the expenditure by the executor, under allowance by the probate court, of a reasonable sum for a tombstone, a proper expense of administration?

It is quite generally held in the case of solvent estates that the necessary cost of a reasonable tombstone placed at the grave of a deceased person is properly classed as funeral expenses or expenses of administration which may be allowed to an executor or administrator in settlement of his account. Pease v. Christman, 158 Ind. 642, 64 N. E. 99; Ferrin v. Myrick, 41 N. Y. 315; Van Emon v. Superior Court, 76 Cal. 589, 18 Pac. 877, 9 Am. St. 258; Spire v. Lovell, 17 Ill. App. 559; Griggs v. Veghte, 47 N. J. Eq. 179, 19 Atl. 867; Kroll v. Close, 82 Oh. St. 190, 92 N. E. 29, 28 L.R.A.(N.S.) 571. It has been so held even when no provision is made in the will therefor. Webb's Estate, 165 Pa. St. 330, 30 Atl. 827, 44 Am. St. 666. The propriety of the expenditure and the amount of it, it is said, should rest largely in the discretion of the probate court. Fairman's Appeal from Probate, 30 Conn. 205; Crapo v. Armstrong, 61 Iowa, 697, 17 N. W. 41.

In some cases, in which provision is found for such expenditure in the will, it has been held to be a proper expense of administration and not subject to an inheritance tax. Morrow v. Durant, 140 Iowa, 437, 118 N. W. 781, 23 L.R.A.(N.S.) 474, 17 Ann. Cas. 850. See also In Re Edgerton's Estate, 35 App. Div. 125, 54 N. Y. Supp. 700; Id. 158 N. Y. 671, 52 N. E. 1124; In Re Fay's Estate, 62 Misc. 154, 116 N. Y. Supp. 423; In Re Maverick's Estate, 135 App. Div. 44, 119 N. Y. Supp. 914; Ross, Inheritance Taxation, § 276.

No case is cited to us where this question has arisen as it does here in the absence of any provision in the will. It seems to us, however, that

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the principle is the same. The terms of the will might be quite material in determining the propriety of the expenditure, but, if such expenditure is in fact made, the terms of the will mean nothing in determining whether the expenditure does or does not constitute an expense of administration. If it is an expense of administration in one case, it is in another.

We think on principle, as well as on authority, the expenditure under order or with the approval of the probate court, of a reasonable sum for a suitable tombstone to be placed upon the grave of the deceased should be considered an expense of administration of his estate. We so hold. It follows that the amount so expended is not subject to inheritance taxation.

Order affirmed.

CHARLES D. BAKER v. ANNA MARIA BERG AND OTHERS.[1]

October 12, 1917.

Nos. 20,348—(164).

Land grant — map of definite location of road — homestead entry.

1. The right of the railroad company to lands granted under the act of Congress of July 2, 1864, attaches upon the filing with and acceptance by the Interior Department of the map of definite location, but does not apply to lands upon which a homestead entry is pending.

Same — changes authorized by act of 1871 — when effective.

2. The act of Congress of March 3, 1871, does not become effective until the filing of the release therein provided for with the Interior Department.

Same — withdrawal of odd numbered sections from market.

3. Where the land department transmitted to the district land office a map showing the 10 and 20 mile place and indemnity limits of the grant under the act of March 3, 1865, and withdrew the odd numbered sections within such limits from market, the withdrawal becomes effective and remains in force until revoked.

[1]Reported in 164 N. W. 588.

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Public land — passing of title — adverse possession under state statute.

4. The title to public land does not pass from the government until the issuance of a patent, and while the title is in the United States no adverse possession of it can, under a state statute of limitations, confer a title which will prevail against the legal title under a patent from the government.

Adverse claims — waiver of claim by litigating issue.

5. Where, in an action to determine adverse claim to real estate, defendants plead title in themselves and set out the source thereof, and also specify the source and defects which they claim in plaintiff's title, and the same is litigated upon the trial, they waive the right to claim that the action was improperly brought.

Action in the district court for Otter Tail county to determine adverse claims to vacant and unoccupied real estate. The answer alleged that for more than 27 years defendants, their ancestors, predecessors and grantors had been in actual, open, notorious, visible, continuous, hostile, exclusive and adverse possession of all the real estate in controversy. The case was tried before Parsons, J., who made findings and ordered judgment in favor of plaintiff. Defendants' motion for amended findings of fact and conclusions of law was granted in part and denied in part. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

Gunderson & Leach, Hilton & Thompson, H. Steenerson and *Samuel Herrick,* for appellants.

N. F. Field and *Thomas R. Benton,* for respondent.

QUINN, J.

This is an action to determine adverse claim and to quiet the title to lots 8 and 9 of section 5, township 133 north, range 40 west, in Otter Tail county. The trial court found that the land was vacant, that plaintiff was the owner thereof and that defendants have no title or interest therein, and ordered judgment accordingly. Judgment was so entered and defendants appealed.

The land was part of the public domain and open to settlement under the pre-emption and homestead laws. It was also within the limits of the grant of July 2, 1864, to the Northern Pacific Railway Company. June 9, 1870, Francis Pierz entered the same as a homestead. This

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entry remained of record until December 14, 1871, when it was canceled. The map of definite location of the company's line of road in Minnesota was filed with and accepted by the Interior Department November 20, 1871, on which date the company's right attached to the granted lands, but did not attach to the premises in question because of the Pierz entry. Hastings & Dakota R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. ed. 363; Whitney v. Taylor, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. ed. 906.

The land was also within the indemnity limits of the grant to the state of Minnesota by the acts of Congress of March 3, 1857, March 3, 1865, and March 3, 1871,[1] to aid in the construction of the St. Vincent extension of the St. Paul & Pacific Railroad Company's railway. This grant was subsequently owned by the St. Paul, Minneapolis and Manitoba Railway Company and later the Great Northern succeeded thereto.

The act of 1871 authorized the company to so change its branch lines as to form a more direct route from St. Cloud to St. Vincent, with the same proportional grant of lands, to be taken in the same manner along the new lines, as provided for along the former lines by the prior laws. The act of 1871 also provided that it should take effect only upon condition that proper releases be made to the United States by the company, of all lands along the abandoned lines, and that upon the execution of such releases the land so released should be considered as immediately restored to market. The company accordingly changed its branch lines, and its map of definite location thereof was filed with and accepted by the Interior Department on November 18, 1871. The release was filed with and accepted by the Secretary of the Interior December 19, 1871.

On February 6, 1872, the commissioner of the general land office transmitted to the district land office a map showing the 10 and 20 mile place and indemnity limits of the grant, and directed the withdrawal from settlement and entry of all odd numbered sections within such limits in conformity with section 7, of the act of March 3, 1865 [13 St. c. 105, p. 527] which reads: "That as soon as the Governor of the said State of Minnesota shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said road and branches, then it shall be the duty of the Secretary of the Interior to withdraw

[1][11 St. 195; 13 St. 105; 16 St. 588.]

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from market the lands embraced within the provisions of this act."

November 5, 1886, Anton C. Berg settled upon the land. January 20, 1887, he filed a pre-emption declaration thereon, and on January 11, 1888, made final proof, paid the purchase money and received a certificate of entry. He fenced the land, placed buildings thereon, in which he lived with his family for a number of years, cleared a few acres which he cultivated, and paid the taxes until the year 1897, when he died intestate, leaving him surviving his widow and nine children, the defendants herein, who have since paid the taxes, pastured and otherwise occupied the land. Berg's estate was probated and the land decreed to defendants.

September 7, 1890, the Manitoba Campany filed in the district land office its list of indemnity selections, which embraced the lots in question apparently in lieu of the west half of the southwest quarter of section 15, 124 north, 32 west, which was rejected by the local land office, upon the ground that it conflicted with the Berg and other entries. Upon appeal the commissioner reversed this decision on March 7, 1892, held Berg's entry for cancelation and allowed the company's selection, upon the ground that the land was withdrawn from entry prior to the time of Berg's settlement thereon. Berg appealed to the secretary of the interior who, on July 23, 1900, affirmed the decision of the commissioner and canceled Berg's entry.

October 24, 1907, the company filed a second selection list which embraced the land in question in lieu of the same land mentioned in its former selection. This selection was approved May 4, 1908. On May 7, 1908, the land was patented to the state and later by it conveyed to the Great Northern and in June, 1914, by that company conveyed to the plaintiff who brought this action.

Under the act of 1871, there was no operative grant until there was an effective release of the lands along the abandoned lines. The transaction was in the nature of an exchange of properties. The act granted to the company the land, to take effect only upon the company's releasing the lands along the abandoned lines to the government, and when this was done the land department was to withdraw the granted lands from market and afford the company an opportunity to select. Such release was filed with and accepted by the department December 19, 1871, five

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days after the Pierz entry was canceled, on which date the act took effect and the company's right of selection attached. While the map of definite location was filed prior to the cancelation of the Pierz entry, and the release was adopted by the company on the day preceding the cancelation, yet it was not executed so as to become effective until it was filed with the department. St. Paul & Pac. R. Co. v. Northern Pac. R. Co. 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77.

One question is, whether the land department was in error of law in holding the land to have been withdrawn and not open to settlement at the time of Berg's entry. We are of the opinion that the ruling was correct. The company had filed the release as provided by the act. The department had withdrawn the land from settlement in compliance with the statute. No attempt to revoke the withdrawal had been made at the time of the settlement or filing. The selection was made prior to the passage of the act of September 29, 1890. The selection was finally approved. As said in the case of Oregon & C. R. Co. v. U. S. 189 U. S. 103, 112, 23 Sup. Ct. 615, 47 L. ed. 726: "It has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—this rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land department; and then its right relates to the date of the selection."

In the answer defendants allege title by adverse possession. The reply puts this allegation in issue. At the trial there was testimony offered along this line. Defendants' second assignment of error goes to this phase of the case. Counsel in their briefs give considerable space thereto. The trial court made no findings thereon, nor did appellants so request.

The title to the land did not pass from the government until the issuance of the patent in 1908, and while the title was in the United States, no adverse possession of it can, under a state statute of limitations, confer a title which will prevail against the legal title under a patent from the government. Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. 83, 33 L.

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ed. 327; Gibson v. Chouteau, 13 Wall. 102, 20 L. ed. 534; Simmons v. Ogle, 105 U. S. 271, 26 L. ed. 1087.

The contention of appellants, that because the proof showed that plaintiff was never in possession of the premises, and that the same were not vacant and unoccupied, the action cannot be maintained, should not be sustained. Defendants allege in their answer title in themselves and set forth the source thereof. They also specify the source and defects in the plaintiff's alleged title. This being the status of the pleadings, the case comes within the rule stated in Mitchell v. McFarland, 47 Minn. 535, 50 N. W. 610, and the point that the action was not properly brought is waived.

It is contended that the Glende entry referred to in the briefs was in the same situation as the entry here in question, and that it was inconsistent to allow one and deny the other. The record shows that the Glende entry was patented before the railroad company filed its selection and that the decision rejecting the selection was upon the ground that the department had lost jurisdiction over the land by the issuance of the patent. The ruling was correct.

Affirmed.

STATE v. HENRY E. KRANTZ.[1]

October 12, 1917.

No. 20,446.

Verdict sustained by evidence.

1. Evidence considered and *held* sufficient to sustain a conviction of assault with intent to commit rape.

Criminal law — declaration admissible in evidence.

2. It is competent, in a prosecution for assault with intent to commit rape, to give in evidence a declaration of the fact made to prosecutrix's close friend at the first opportunity and shortly after the transaction, in corroboration of her testimony.

[1]Reported in 164 N. W. 579.

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Same — assault with intent to commit rape.

3. If a man assaults a woman with intent to have intercourse with her by force and against her will, the crime of assault with intent to commit rape is complete.

Same — same — evidence.

4. The use of force in an endeavor to have carnal knowledge of a woman, tends to show an intent to commit rape, and if the evidence satisfies the jury that the defendant used such force and so conducted himself as to evince an intention to commit rape, it is sufficient to sustain a conviction of an assault with an intent to commit rape.

Defendant was indicted for the crime of rape, tried in the district court for St. Louis county, before Ensign, J., and a jury which found him guilty of an assault with intent to commit rape. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Lathers & Hoag and *Fryberger, Fulton & Spear,* for appellant.

Lyndon A. Smith, Attorney General, *James E. Markham,* Assistant Attorney General, *Warren E. Greene,* County Attorney, and *Mason M. Forbes,* Assistant County Attorney, for respondent.

QUINN, J.

The defendant was indicted, charged with the crime of rape, committed by forcibly overcoming the resistance of the prosecutrix. In opening the case to the jury, the prosecuting attorney stated that the state sought a conviction only for assault with intent to commit rape, and in its charge the court submitted only that offense to the jury. The jury returned a verdict of guilty of an assault with intent to commit rape. From an order denying his motion for judgment notwithstanding the verdict or for a new trial defendant appealed.

The testimony shows that, at the time of the alleged assault, the complainant was but 17 years of age; that she lived with her mother, and when not in school worked at various kinds of employment; that on Saturday, January 15, 1916, she obtained employment with the defendant in his meat market in Duluth, through an employment bureau; that the defendant was 50 years of age with a family consisting of his wife and two grown daughters, one of whom worked in the market, which

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was conducted in a room having a glass front and facing upon one of the public streets of the city; that this room was divided by a board partition which had a door and window in it, the front room being used for the market and the back room as an office and work place having an outside door at the rear.

The complainant testified that on the morning of January 17, 1916, she arrived at the market at half past seven o'clock; that the defendant arrived shortly thereafter; that he then built a fire in the office and that both she and the defendant worked about the place until the daughter arrived some two hours later, when the defendant left to attend to other business and did not return until about four o'clock in the afternoon; that she and the daughter worked about the market during the day, and that upon the return of the defendant the daughter went home; that defendant then worked in the market until about six o'clock when he came into the office shutting the door behind him; that he then went to the rear door and tried it and it was locked, and then approached complainant making some indecent remark and putting his arm around her waist; that she pushed his arm away and that he then grabbed her violently and a scuffle followed; that she nearly got away from him when she stumbled backward over a chair and he committed the act complained of in the indictment; that when she got got up and away from him she grabbed her hat and cloak and rushed out, going to the home of her friend Katherine Ellis, a distance of some 18 blocks; that when she arrived at the Ellis home the family were sitting down to supper and she went into the bathroom and there told Miss Ellis what had happened. Katherine Ellis testified that the complainant had lived with her when attending high school and worked for her board; that she came to the Ellis home on the evening in question at about a quarter of seven; that her hair was all down, her stocking-cap hung from the top of her head, her cloak was all unbuttoned, her hands bare, her face all streaked with tears and she looked very untidy.

The prosecuting attorney then asked the witness the following question: "Q. What complaint did she make to you?" The defendant objected to the question as being immaterial, irrelevant, not part of the res gestae, and being too remote in point of time. The objection was overruled and the witness answered: "I asked her what was the matter. She

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was crying and she said: 'that man has done something to me.' * * * I said: 'What man?' She said: 'That man at the meat market.' I said: 'You mean one of the clerks?' She said: 'No, the man himself.' I said: 'What do you mean, done something, what did he do?' And she said: 'I don't know' and started to cry, and I said: 'Well, you know.'" The witness then further testified: "She told me then what had happened down there." I then took her home. She acted very nervous and hysterical, and I went for Dr. Hirschfield. Other witnesses testified as to the complainant's appearing very nervous and hysterical during the evening.

It is now urged on behalf of the defendant: (1) That the evidence is insufficient to sustain the verdict; (2) that the court erred in admitting the testimony of the particulars of the complaint made by the prosecutrix to the witness Ellis some time after the alleged assault; (3) that the trial court erred in charging the jury as a matter of law that the statement of the complaining witness after the alleged offense corroborated her testimony, and in directing special consideration to all the details of this statement; (4) that it was misconduct on the part of the state's attorney to argue punishment and mislead the jury as to punishment.

It is argued that from the complainant's own statement of what occurred in the office as to her conduct and demeanor, in view of the time and place of the alleged assault, there is not sufficient proof of resistance on her part to warrant a conviction. If the occurrences were as detailed by her, the evidence, in our opinion, was ample to justify the verdict of the jury. If the defendant assaulted the complaining witness with the intention of having intercourse with her by force and against her will, the crime of which he stands convicted was complete. State v. Bagan, 41 Minn. 285, 43 N. W. 5. The use of force in an endeavor to have carnal knowledge of a woman, tends to show an intent to commit rape, and if the evidence satisfies the jury that the defendant used such force and so conducted himself as to evince an intention to commit rape, it is sufficient to sustain a conviction of an assault with an intent to commit rape. State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; State v. Cross, 12 Iowa, 66, 79 Am. Dec. 519; State v. Hartigan, 32 Vt. 607.

Upon the trial the state was permitted, over objection, to show that the prosecutrix made complaint of the alleged commission of offense to

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her friend, Katherine Ellis, when she reached the home of the latter on her way from the place of the occurrence. The testimony was objected to upon the ground that it was immaterial and irrelevant, not part of the res gestae and too remote in point of time. If the testimony was offered solely as part of the res gestae, there might be some merit in the contention, but such complaint made so shortly after the alleged commission of the offense, to her close friend at the first opportunity, was admissible not perhaps because a part of the res gestae, but because it is a fact tending to corroborate the testimony of the prosecutrix. 3 Greenleaf, Evidence, § 213; State v. Reid, 39 Minn. 277, 39 N. W. 796; State v. Connelly, 57 Minn. 482, 485, 59 N. W. 479; State v. Richards, 33 Iowa, 420; State v. Peterson, 110 Iowa, 647, 82 N. W. 329; Burt v. State, 23 Oh. St. 394.

It is insisted that the testimony of the witness Ellis as to what the prosecutrix said to her should have been excluded as hearsay. There was no objection upon that ground, but if there had been we fail to see how the answer could have prejudiced the rights of defendant. It was a statement as to what had happened, not how it happened, nor was the name of the defendant mentioned. It was a mere statement leading up to the complaint and exclamation. The girl was crying, and said: "That man has done something to me * * * that man at the meat market." "You mean one of the clerks?" "No, the man himself." "What did he do?" "I don't know," and she started to cry. The statement amounts to nothing more than a complaint that an assault had been made. Defendant complains of the giving of certain instructions by the court and of remarks made by counsel for the state in his argument to the jury. We do not find that any of these complaints are well founded. The jury was carefully instructed, and the argument objected to was not such as to prejudice defendant.

Affirmed.

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HERMAN SPIERING v. CHARLES F. SPIERING.[1]

October 12, 1917.

No. 20,483.

Bills and notes — findings sustained by evidence.

1. The findings of fact are supported by the evidence.

Same — alteration of promissory note — insertion of word "hundred."

2. An alteration of an instrument, in order that it shall prevent recovery thereon, must be a material one and made with intent to defraud. Under this rule where by mistake in drawing a promissory note for five hundred dollars the word "hundred" is omitted, though the figures expressing the amount are correctly written, it is not an alteration which prevents recovery for the holder of the note to write in the omitted word.

Action in the district court for Lac qui Parle county to recover $500 on a promissory note. The facts are stated in the opinion. The case was tried before Qvale, J., who when plaintiff rested denied defendant's motion to dismiss the action, and made findings that the note be reformed by the insertion of the word "hundred," and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

T. J. McElligott and *Robert D. Jones,* for appellant.

A. W. Ewing, for respondent.

BUNN, J.

This action was to recover on a promissory note. The complaint alleged the execution and delivery of the note by defendant to plaintiff, that the true consideration thereof and the amount intended by the parties to be inserted therein and agreed thereby to be paid was five hundred dollars, but that by a mistake of the person who drew the note the word "hundred" was inadvertently omitted between the words "five"

[1]Reported in 164 N. W. 583.

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and dollars, though where the amount was expressed in figures, it was correctly written "$500.00." Plaintiff asked that the mistake be corrected, and that he have judgment for $500 and interest. The answer, in addition to general and specific denials of allegations of the complaint, alleged that defendant had given to plaintiff a note for five dollars, that afterwards the same was materially and fraudulently altered without defendant's consent by adding the word "hundred." It was further alleged that the note was without consideration, and procured by fraud. There was a reply in which these allegations of the answer were denied, and the issues thus made were tried by the court without a jury. The decision was in favor of plaintiff, judgment was entered thereon, and this appeal taken by defendant from the judgment.

Insofar as defendant challenges the findings of fact of the trial court that there was a sufficient consideration for the note, that it was intended by both parties to be a note for five hundred dollars, and that the omission of the word "hundred" was an inadvertence on the part of the person who drew the note, we need only say that the evidence amply supports these findings.

It was found as a fact and is conceded that plaintiff on discovering the mistake took the note to the banker who drew it and he wrote in the word "hundred." This was without defendant's knowledge. These facts form the basis of the contention of defendant that there was a material alteration of the instrument which renders it void. The cases are not all in accord as to the proper conclusion on such a state of facts. They will be found collected in 2 C. J. 1229, et seq. As there was an entire absence of intent to defraud on the part of plaintiff, as the alteration was merely to correct a mistake and make the instrument conform to the undoubted intention of the parties, we are of the opinion that in reason the better rule is that the instrument is not avoided. It may well be said that the alteration was not a material one under the circumstances, and that it did not change the legal effect of the instrument. In addition to the discussion and authorities found in Corpus Juris, the case of Busjahn v. McLean, 3 Ind. App. 281, 29 N. E. 494, is much in point. There is nothing in any of our own cases that works against this view. On the contrary, the often repeated statements that an alteration,

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to avoid an instrument, must be made with intent to defraud, and must be a material one, strongly support the conclusion reached.

Judgment affirmed.

J. L. BIEDER COMPANY v. ALFRED E. ROSE.[1]

October 12, 1917.

No. 20,501.

Action on foreign judgment — statute of limitations.

An Illinois judgment, entered August 13, 1907, was not outlawed March 16, 1916, under the Illinois statutes which provide that no execution shall issue on a judgment after seven years, but that action of debt on the judgment may be brought within 20 years after the date of the judgment. Section 7709, G. S. 1913, which provides, that when a cause of action has arisen outside of this state and by the laws of the place where it arose action thereon is barred by lapse of time, no such action shall be maintained in this state, has no application to such a case.

Action in the district court for Hennepin county to recover $922.70 upon a judgment entered in the municipal court of Chicago in 1907. The case was tried before Steele, J., who made findings and ordered judgment in favor of plaintiff for the amount demanded. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Eugene S. Bibb, for appellant.

Henderson, Wunderlich, Brandebury & Stiles, for respondent.

HALLAM, J.

This is an action on a judgment entered in the municipal court of the city of Chicago on August 13, 1907. This action was commenced March 16, 1916. The claim of defendant is that the judgment was outlawed when this action was brought. The trial court decided adversely to this contention and the defendant appealed.

Section 7700, G. S. 1913, provides that "no action shall be maintained

[1]Reported in 164 N. W. 586.

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upon a judgment * * * of any state * * * unless begun within ten years after the entry of such judgment." This section applies to foreign as well as domestic judgments. Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450. Under this section the judgment was not outlawed.

Section 7709 provides, however, that "when a cause of action has arisen outside of this state, and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state." An exception follows which is not important here. Defendant contends that by the laws of Illinois, where this cause of action arose, that is, where this judgment was entered, action upon it was barred by lapse of time before this suit was brought, and that therefore by reason of section 7709 no action can be maintained in this state.

The pertinent Illinois statutes are as follows: Section 6, chapter 77, Hurd's Rev. St. 1915 provides: "No execution shall issue upon any judgment after the expiration of seven years from the time the same becomes a lien, except upon the revival of same by *scire facias*." Section 26, chapter 83, provides: "Judgment in any court of record in this state may be revived by *scire facias*, or an action of debt may be brought thereon within twenty years after the date of such judgment, and not after."

It seems clear from reading these sections together, that defendant's contention cannot be sustained. If action on the judgment had been barred by the laws of Illinois, no action could have been maintained upon it in this state, but action on the judgment was not barred by the laws of Illinois, for the laws of Illinois provide expressly to the contrary, that is, they provide that action on the judgment may be brought within 20 years after the judgment is entered.

The fact that no execution can be issued on the judgment after seven years is not of controlling importance. Our statute, section 7709, denies a right of action on a cause of action which arose in another state and not outlawed here, only in case "action thereon is there barred by lapse of time" by the laws of the state where the cause of action arose. It is the right to bring action on the judgment in the state where it was entered, and not the right to issue execution on it, that is important. The fact that an execution cannot be issued on a judgment may have a

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bearing upon its status, but a judgment may be complete as a cause of action though no right to an execution exists. See Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; Epling v. Dickson, 170 Ill. 329, 48 N. E. 1001. Defendant has cited a number of decisions arising under statutes which fix a limit of time within which execution may be issued, but which do not, as does the Illinois statute, prescribe a longer time for the bringing of an action on the judgment. These decisions do not help us in construing the statute before us.

Order affirmed.

ST. PAUL SOUTHERN ELECTRIC RAILWAY COMPANY v. JOHN H. FLANAGAN.[1]

October 12, 1917.

No. 20,507.

Negligence — pleading — question for jury.

1. Upon the facts stated in the complaint the question of defendant's negligence in driving a traction engine and grain separator upon the tracks of an electric railway, at a highway crossing, when there was a dense fog, without ascertaining whether a train, then known by him to be due, was approaching, and without notifying the operator of the train that he was attempting to make the crossing, is for the jury.

Same — contributory negligence.

2. The complaint does not, by allegations or by inference from facts alleged, show contributory negligence.

Action in the district court for Dakota county to recover $2,246.43 damages caused by collision with defendant's traction engine. From an order, Converse, J., sustaining defendant's demurrer to the complaint, plaintiff appealed. Reversed.

Todd, Fosnes, Sterling & Nelson, for appellant.

McNamara & Waters, for respondent.

[1]Reported in 164 N. W. 584.

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HOLT, J.

A demurrer to the complaint was sustained and plaintiff appeals. The pleading alleged, in substance, that plaintiff operated an electric railway between St. Paul and Hastings, Minnesota; that one of its cars from Hastings was due at a station on its line known as Brown's Crossing at 7:39 a. m; that this car left Hastings on the morning of September 23, and when it was approaching Brown's Crossing defendant wilfully, negligently and wantonly there drove upon the right of way and track of plaintiff a heavy traction engine to which was attached a grain separator; that at the time defendant drove said engine upon the track of plaintiff there was a dense fog and he well knew that the car operated by plaintiff was due to pass at Brown's Crossing, but he nevertheless failed and neglected to use any means to notify the operators of plaintiff's car that the traction engine was then on the track upon which said car of plaintiff was running; and that, by reason of said negligence of defendant, plaintiff's car collided with the traction engine whereby the car was broken and damaged in a stated amount.

It does not appear from the complaint that the collision took place upon a public highway, unless it is to be inferred from the name of the station. But, since the court below and the attorneys for both parties assume the accident to have happened at a place where a public highway intersects plaintiff's right of way, we indulge the same assumption. In the nature of things, the trains or cars operated by railroads along their own right of way are not expected to give precedence to persons or vehicles at intersections of public highways. The necessity of rapid and safe public transportation forbids the slowing down of trains at every highway intersection so as to give the traveler on the highway, who perchance is nearer the intersection, the right to cross first. Statutory enactments impliedly recognize that it is the duty of travelers on public highways to refrain from attempting to pass over a railroad grade crossing when there is danger of collision with an approaching train. The railroads are required by signs and signals to notify travelers on the highways of the existence of a railroad crossing and of the approach of their trains. This evidently with the purpose that no one shall attempt to cross when a train or car is so near that a collision might ensue. Travelers on public highways approaching a railroad crossing must give

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the right of way to advancing trains or cars. As said in Hendrickson v. Great Northern Ry. Co. 49 Minn. 245, 51 N. W. 1044, 16 L.R.A. 261, 32 Am. St. 540: "Where a railway and a public road intersect, the rights of the traveler and of the railway company are regarded as equal, but, of course, the traveler must yield the right of way to a train drawing near." This, of course, has no general application to street railway companies operating cars by electricity or other power along a public street. It may be conceded that the general allegation of negligence in driving the traction engine upon the track does not avail in view of the subsequent specific charge of negligence in failing to give notice. But even so, it would seem that a jury might properly find that an ordinarily prudent person, knowing that this car was then due, would not undertake to make this crossing in a dense fog with a slow traveling traction engine, pulling a threshing rig behind, without having certain knowledge that the car was not so near that a collision would be imminent, or without taking the precaution to warn the operators of the expected car that he was in the act of crossing. That defendant did not ascertain whether or not the car he knew to be due was dangerously near appears from the stated fact that a collision did occur. We think it cannot be said, as a matter of law, that the conduct of defendant under the circumstances alleged does not constitute actionable negligence.

The contention is not tenable that the complaint affirmatively discloses contributory negligence of plaintiff. The dense fog accounts for the failure to observe defendant's approach and use of the crossing. No inference may be indulged in that the statutory warnings and signals were not given or that there was excessive speed or any other negligence in the management of the car. The presumption is that those in charge of plaintiff's car used ordinary care in its operation.

The case of Belshan v. Illinois Cent. R. Co. 117 Minn. 110, 134 N. W. 507, does not appear to sustain defendant's position. There a traction engine and threshing outfit stalled upon a highway crossing on account of the railroad company's neglect to keep the crossing in proper repair. The owners of the threshing outfit spent some little time in an effort to get loose before they endeavored to signal an approaching train which they knew was due, but was not in sight, when the crossing was attempted. It was held that it was properly left to the jury to determine whether the

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owner's failure to give timely warning of their predicament constituted contributory negligence.

In our opinion it was error to sustain the demurrer herein.

Order reversed.

JOSEPH PELTIER v. LEON NADEAU.[1]

October 12, 1917.

No. 20,512.

Trover and conversion — right of action — estoppel by judgment.

Plaintiff turned over certain personal property to defendant in part payment of a debt and defendant accepted it as such part payment. Subsequently defendant brought suit for the debt and recovered a judgment which he collected. Thereafter plaintiff, claiming that no credit for the part payment had been given in the former suit, brought this suit for conversion of the property. *Held* that an action for conversion will not lie as the ownership of the property had passed from plaintiff to defendant, and that plaintiff should have asserted his claim of part payment in the former suit.

Action in the district court for Hennepin county to recover $500 for the conversion of certain furniture and fixtures. The facts are given in the opinion. The case was tried before Jelley, J., who when plaintiff rested granted defendant's motion to dismiss the action. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Will A. Blanchard, for appellant.

Joseph Brorby and *Joseph J. Granbeck,* for respondent.

TAYLOR, C.

Defendant had a barber shop and in connection therewith a cigar and confectionery stand in a building owned by him at Forest Lake in Washington county. In 1910, he sold the shop outfit and the cigars and confectionery then on hand to plaintiff on credit and leased the building to him. Plaintiff took possession and conducted the business until 1913,

[1]Reported in 164 N. W. 578.

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when he quit and turned the shop back to defendant. Defendant took possession and operated the shop for two or three weeks, and then sold the furniture and fixtures to a third party. Plaintiff claiming to own the furniture and fixtures brought this suit to recover damages for the conversion thereof. At the close of plaintiff's evidence the trial court dismissed the suit, and plaintiff appealed from an order denying a new trial.

To sustain an action for conversion plaintiff must show that the property in controversy belonged to him and not to defendant at the time of the alleged conversion. From plaintiff's testimony it appears that he bought the shop-outfit under an agreement that defendant would take it back whenever he wished to quit; that he notified defendant in 1913 that defendant "would have to take the place back"; that at this time he was indebted to defendant in an amount which included the price he had agreed to pay for the shop-outfit and perhaps other items; that pursuant to the notice given by him he and defendant took an inventory of the property in question and fixed its value at a sum less than the amount of such indebtedness; and that on the same day he removed his household goods from the portion of the building which he had occupied as a residence, and turned over to defendant the possession of the building and of the property in controversy. Although plaintiff claims that the final settlement was to be made later and was never completed, his own version of the transaction makes it clear that both parties understood and agreed that the property in controversy was returned to and taken back by defendant, and that its agreed value was to be applied upon the indebtedness due to defendant.

More than a year later, defendant brought suit against plaintiff, in form, for the original purchase price of the shop-outfit sold to him. Plaintiff made no defense and defendant recovered judgment for the amount claimed which was subsequently paid and satisfied. Thereupon plaintiff brought the present suit for damages for the conversion of the property which he had returned. Defendant, in his answer in the present suit, asserts that the judgment in the former suit was only for the balance due him over and above the value of the property returned by plaintiff. Plaintiff denies this and claims that defendant took judgment for the entire indebtedness without deducting therefrom the value of the

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property returned. However this may be, as it is clear that the property was returned to and taken over by defendant under a mutual agreement that its agreed value should be applied upon the indebtedness, it became the property of defendant, and this suit in conversion will not lie. If defendant failed to give proper credit for the property returned and brought suit for more than was due, plaintiff should have presented his defense of partial payment in that suit.

Order affirmed.

FRANK B. MATLOCH v. EDWARD C. JERABEK.[1]

October 12, 1917.

No. 20,574.

Broker — action for procuring purchaser — verdict supported by evidence.

1. The evidence justified a recovery by a real estate agent for procuring, at defendant's request, a person to whom defendant effected a sale of his house and lot.

Same — evidence necessary.

2. Plaintiff's employment being to procure a purchaser and not to negotiate a sale, it was not necessary to prove that the one procured by him was induced to buy because of plaintiff's efforts or representations.

Same — absence of agreement — usual compensation.

3. There being no agreement as to compensation, it was proper to show the customary rate charged for such services as plaintiff rendered.

Accord and satisfaction not in issue.

4. The evidence did not raise an issue of accord and satisfaction.

Action for $90. Plaintiff recovered judgment for $45 in justice court and appealed to the municipal court of St. Paul. The appeal was heard before Finehout, J., who when plaintiff rested denied defendant's motion to dismiss the action, and a jury which rendered a verdict for the amount

[1]Reported in 164 N. W. 587.

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demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

Harry H. Peterson, Harry W. Oehler and Ottocar Sobotka, for appellant.

Gustavus Loevinger, for respondent.

HOLT, J.

Plaintiff alleged that defendant was indebted to him in the sum of $90 for services rendered as a factor and agent in procuring for defendant an acceptable purchaser for a house and lot in St. Paul, Minnesota. The answer was a general denial, and a defense of accord and satisfaction. A verdict for the full amount was rendered and defendant appeals from the order denying his motion, in the alternative, for judgment notwithstanding the verdict or a new trial.

There was evidence to this effect: That defendant requested plaintiff, a real estate agent, to find a purchaser or prospect, for a house and lot which defendant owned and desired to sell, and for so doing defendant would make it right with plaintiff for whatever he was entitled to; that plaintiff agreed so to do, and then mentioned one Kohler as one who might be procured; that defendant asked that no proposed purchaser be invited to view the premises for a couple of weeks, or until the remodeling of the house could be completed; that within that time plaintiff spoke to Kohler about defendant's property, advised him to examine it and told him that it was a good proposition for him to buy; that a few days thereafter he again saw Kohler and urged him to see defendant and buy the property; that Kohler thereupon interviewed defendant, examined the premises, and got the price and terms upon which a purchase could be made but did not then conclude to buy; that before anything further was done plaintiff, supposing a sale had been effected, telephoned defendant concerning Kohler and asked compensation for his services; that he was informed that there had been no sale as yet to Kohler, but if there should be he would make it all right with plaintiff; that within a week or two defendant sold the property to Kohler for $1,800; and that the customary price paid real estate agents for procuring a purchaser was 5 per cent of the selling price up to $5,000. Such being the evidence, which the jury might find to be the truth, it is plain

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that no error was made in denying defendant's motion for judgment. It is to be observed that the employment was to find a prospect or purchaser, and not to negotiate a sale. In this situation the authorities, cited to the point that no recovery can be had unless the agent is the efficient cause in closing the bargain, are not applicable. Plaintiff had performed his part when he procured a purchaser to whom defendant did make a sale upon such terms as defendant chose to fix. McDonald v. Smith, 99 Minn. 42, 108 N. W. 291. Before defendant closed the deal he knew, according to the testimony of both parties, that plaintiff claimed to have procured Kohler and recognized that some compensation was due therefor.

The errors assigned as grounds for a new trial do not appear of sufficient merit to warrant extended discussion. Holding, as we do, that defendant is not entitled to judgment notwithstanding the verdict, also decides that no error was committed in denying defendant's motions to dismiss and for a directed verdict. Whether plaintiff's recommendations induced Kohler to buy or the latter acted upon his own judgment, can have no bearing on plaintiff's right to compensation in this case, where the jury could find that the employment was simply to produce a person to whom defendant could make a sale. Kohler, called by defendant, testified that no other person than plaintiff spoke to him about buying of defendant. It therefore becomes wholly immaterial what was said between defendant and one Polochski in regard to the property. Whether plaintiff agreed to find a purchaser was for the jury to determine from what was said by the parties at the time of the alleged employment and not from a question calling for defendant's conclusion.

Defendant, with knowledge of plaintiff's occupation, requested him to find a purchaser for the property in question. Plaintiff, without objection, testified to a prevalent customary rate of charges for such services among real estate agents in St. Paul. There was no error in permitting the witness to state the rate so fixed by custom. Where a business custom, definite, uniform and well established, exists in respect to charges, or rates of compensation, for services rendered in a particular occupation, it may be assumed that, in contracting for such services, the parties made such charges or rates a part of their agreement, in the absence of an understanding to the contrary. Stevens v. Wisconsin Farm Land Co.

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124 Minn. 421, 145 N. W. 173. Defendant did not question the existence of this custom, nor did he deny knowledge thereof, and he offered no evidence at all as to the reasonable value of the services rendered. We therefore think the court rightly instructed the jury that plaintiff was entitled to the customary rate if the verdict was in his favor.

Defendant pleaded accord and satisfaction. It appears that, after the sale, plaintiff insisted on compensation. Defendant then denied liability, but mailed a check for $5 to plaintiff. No letter accompanied the check and no previous talk had been had looking to a settlement for that or any other amount. Plaintiff did not present the check for payment, but brought this suit. We think the evidence failed to raise an issue of accord and satisfaction.

Order affirmed.

STATE EX REL. VIRGINIA & RAINY LAKE COMPANY v. DISTRICT COURT OF ST. LOUIS COUNTY AND OTHERS.[1]

October 12, 1917.

No. 20,594.

Workmen's Compensation Act — freezing.

1. Freezing is a personal injury caused by accident within the meaning of the Workmen's Compensation Act.

Same — finding sustained by evidence.

2. A workman froze his thumb while working as a swamper. His work required him to cut and handle timber and his hands came in contact with the snow. His work was several miles from camp and there were no facilities for warming. The weather was severely cold. A finding that the freezing arose out of the employment is sustained by the evidence.

Upon the relation of the Virginia & Rainy Lake Company the supreme court granted its writ of certiorari, directed to the district court

[1]Reported in 164 N. W. 585.

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for St. Louis county, to review the proceedings in that court, Hughes, J., under the Workmen's Compensation Act brought by Joe Niemi, as employee, against relator, as employer. Affirmed.

Edward L. Boyle, J. F. Boyle and *E. J. Kenny,* for employee.

Abbott, MacPherran, Lewis & Gilbert, for relator.

DIBELL, C.

Certiorari to review the judgment of the district court of St. Louis county awarding compensation under the Workmen's Compensation Act to Joe Niemi, an employee of the relator, Virginia & Rainy Lake Company. The injury for which the award was made was the freezing of the employee's thumb which resulted in its amputation. The questions are these:

(1) Whether freezing is a personal injury caused by accident within the meaning of the compensation act.

(2) If so, whether the accident arose out of the employment within the meaning of the act.

1. The statute exacts from the employer compensation "in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment." G. S. 1913, § 8203. The term "accident" is defined as follows:

"The word 'accident' as used in the phrases 'personal injuries due to accident' or 'injuries or death caused by accident' in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time injury to the physical structure of the body." G. S. 1913, § 8230 (h).

That freezing is a personal injury within the meaning of the compensation act is not open to question. McManaman's Case, 224 Mass. 554. 113 N. E. 287; Larke v. John Hancock Mut. Life Ins. Co. 90 Conn. 303, 97 Atl. 320, L.R.A. 1916E, 584. Nor is it to be questioned that within the statutory definition it is an "unexpected and unforeseen event," nor that it is an event "producing at the time injury to the physical structure of the body." It has been held an accident within a statute giving compensation in case of an accidental injury but not defining accident. Days v. S. Trimmer & Sons, 176 App. Div. 124, 162 N. Y. Supp. 603;

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Canada Cement Co. v. Pazuk, 22 Quebec K. B. 432, 12 D. L. R. 303, 7 N. C. C. A. 982. So has a sunstroke which affords a helpful though not perfect analogy. Ismay, Imrie & Co. v. Williamson [1908] A. C. 437, 42 Ir. L. T. 213; Morgan v. S. S. "Zenaida," 2 B. W. C. C. 19; Davies v. Gillespie, 5 B. W. C. C. 64. The difficult question is whether the requirement that the event be one "happening suddenly and violently" excludes it. Freezing comes suddenly and violently as distinguished from gradually and naturally or in ordinary course. In common talk a sudden or violent death is one occurring unexpectedly and not naturally or in the ordinary course of events. In some such sense the words are used in the statute. Their effect is not to exclude from accidental injuries all except such as result from physical force applied from without. It is suggested in argument that these particular words with others employed in the same connection were used in caution to exclude occupational and other diseases. Whether such is their effect is not for decision here. We think that a fair construction of the statutory definition does not exclude freezing and we hold that it is a personal injury caused by accident within the meaning of the act.

2. It is not questioned that the employee received his injury in the course of his employment. It is contended that it did not arise out of his employment. It is not enough that it occurred while work was in progress. It must have arisen under such circumstances that a causal connection is traceable between the employment and the freezing and the freezing must be more than a consequence, shared by the community in general, of exposure to cold.

The freezing occurred in January, 1916. The workman was employed by the relator as a swamper in the woods in the northern part of St. Louis county. He was cutting and handling timber and making roads for swamping. He used an ax, handled the timber with his hands, and they came in contact with the snow. The weather was severely cold. He was some 4 or 5 miles from camp. There were no facilities for warming. The building of fires was not permitted. The evidence fairly sustains the view that the character of the employee's work subjected him to a risk of freezing not shared by the generality of the community and sustains the finding that the freezing arose out of the employment. In the following cases, all involving injuries by freezing, findings that the

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freezing arose out of the employment were sustained. McManaman's Case, 224 Mass. 554, 113 N. E. 287; Larke v. John Hancock Mut. Life Ins. Co. 90 Conn. 303, 97 Atl. 320, L.R.A. 1916E, 584; Days v. S. Trimmer & Sons, 176 App. Div. 124, 162 N. Y. Supp. 603; Canada Cement Co. v. Pazuk, 22 Quebec K. B. 432, 12 D. L. R. 303, 7 N. C. C. A. 982. In the following, findings that it did not were sustained: Warner v. Couchman [1911] 1 K. B. 351; Karemaker v. S. S. "Corsican," 4 B. W. C. C. 295.

The general question of what constitutes an accident arising out of employment has had consideration by this and other courts. See State v. District Court of St. Louis County, 129 Minn. 176, 151 N. W. 912; State v. District Court of Ramsey County, 129 Minn. 502, 153 N. W. 119, L.R.A. 1916A, 344; Mahowald v. Thompson-Starrett Co. 134 Minn. 113, 158 N. W. 913, 159 N. W. 565; 1 Bradbury's Workmen's Compensation, 398, et seq.; 1 Honnold, Workmen's Compensation, § 101, et seq.; note L.R.A. 1916A 40; notes Ann. Cas. 1913C, 4; Ann. Cas. 1914B, 498; Ann. Cas. 1916B, 1293; 25 Harvard Law Rev. 401, 517. The case in review does not call for a discussion of the cases. It is enough to say that the finding that the injury was an accident arising out of the employment is sustained.

Judgment affirmed.

BUNN, J. (dissenting).

I am not clear that it can be fairly said that freezing comes "suddenly and violently."

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GEORGE PORTER v. GEORGE H. RITCHIE AND ANOTHER. STATE EX. REL. GEORGE H. RITCHIE AND ANOTHER v. DISTRICT COURT OF HENNEPIN COUNTY AND ANOTHER.[1]

October 12, 1917.

No. 20,631.

Workmen's Compensation Act — temporary partial disability — evidence.

The findings of the trial court that the injury involved in the action, suffered by an employee while engaged in the discharge of his duties, constituted a temporary partial disability, and not a permanent partial disability, *held* sustained by the evidence.

Upon the relation of George H. Ritchie and Patrick P. O'Connell this court granted its writ of certiorari directed to the district court for Hennepin county, to review the proceedings in that court, Dickinson, J., under the Workmen's Compensation Act, brought by George Porter, as employee, against George H. Ritchie and his partner, as employers. Affirmed.

O'Brien, Young & Stone, for relators.

L. E. Ineichen, for respondent.

BROWN, C. J.

Certiorari to review a judgment duly rendered and given in proceedings under the Workmen's Compensation Act. The facts are as follows:

Respondent was in the employ of relators Ritchie & O'Connell, a copartnership, and in the course of his work received an injury for which he was entitled to compensation under the statute. His claim in this respect was recognized by the employers and also their surety, the United States Casualty Company, and on August 18, 1914, a short time after the injury was received the parties, acting under subdivision 1 of section 8216 of the compensation statute (G. S. 1913), amicably settled and adjusted the compensation to be paid him on the basis of that fixed by

[1]Reported in 164 N. W. 581.

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subdivision (b) of section 8207, for a temporary partial disability, namely, one-half the weekly wage for and during the period of disability, not exceeding 300 weeks. The payments were regularly made until April 17, 1917, when relators declined to proceed further under the agreement on the claim that the injury was, or had become, a permanent partial disability, the compensation for which is that fixed by subdivision (c) of section 8207, and that the total amount paid by relators under the agreement exceeded that thereby prescribed for an injury of that kind, hence that they had fully discharged their duty to respondent as imposed by the compensation statute.

Relators then brought this proceeding, setting out in their complaint the facts stated, and as relief demanded that by the judgment of the court they be relieved from further obligation to respondent under the settlement agreement or otherwise. Respondent answered and therein set out facts entitling him, if true, to judgment for the compensation fixed by the statute, less payments theretofore made by relators. When the matter came on for trial it was stipulated by the parties that the sole issue for determination was whether respondent's injury amounted to a temporary or permanent partial disability. The court found the disability temporary, and not permanent, and judgment was ordered for respondent accordingly, and for the weekly payments of compensation by relators during the continuance of the disability, not exceeding 300 weeks from the date of the settlement, less all prior payments.

The only question presented to this court is whether the conclusion of the trial court that the disability of respondent is temporary is clearly against the evidence. We answer the question in the negative. The injury suffered by respondent was to his left leg below the knee, and of a character subsequently to require a surgical operation and the removal of about 5 inches of the tibia bone thereof, which had become diseased by reason of the injury. While it would seem that the removal of a part of the bone would render the limb weaker, of less strength, and therefore a permanent disability, the evidence is clear, and the court so found, that the bone is gradually reforming and will so continue until the normal condition thereof is fully restored, and the limb thus made as useful as before the injury. This process of reformation of the bone tissue in such cases was fully explained by the medical witnesses, and, if their

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testimony be true, a question for the trial court, there is no room to seriously question the conclusion that the disability is temporary and not permanent.

The contention of relator is that since the injury has not yet healed, and payments have been made for over two years, the disability should be treated as permanent and compensation awarded accordingly. The contention is not sustained. The question resolves itself, from the evidence presented, into one of fact. It is not important, at least not conclusive as a matter of law, that relators may be required to pay more for the injury, if it be held a temporary than would be required if held a permanent partial disability. It is apparent under the language of the statute that such a situation may often arise. The compensation for a temporary partial disability may cover a period of 300 weeks, while the same character of injury if found to be permanent may be fully compensated by payments during a much shorter period, amounting in the aggregate to much less than that required if the disability be temporary. But with this feature of the statute we are not concerned. It was competent for the legislature to so provide, and if there be anything wrong with the law in this respect it must be corrected by the lawmaking body. The statute is plain and unambiguous and will admit of no construction other than that indicated. It may be remarked, however, that the period of time covered by the healing process in a particular case may be an important factor in determining the nature and character of the disability, for compensation should not be awarded for the longer period upon the naked claim that the injury is temporary.

The case of State v. District Court of Clay County, 129 Minn. 91, 151 N. W. 530, is not in point. In that case the employee suffered two distinct injuries to his arm, as the result of the same accident, and the trial court ordered the payment of compensation for each. This was held error, our conclusion being that the two injuries should be treated as one, and compensation awarded accordingly. In the case at bar there was but one injury, which the court found created a temporary disability. The injury in State v. District Court of Hennepin County, 136 Minn. 147, 161 N. W. 391, was held by the trial court as one creating a permanent disability, and the only question involved was the

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amount of compensation to be paid therefor. The case is not here in point.

This disposes of the case. The findings of the trial court are sustained by the evidence, a discussion of which would serve no useful purpose.

Judgment affirmed.

STATE EX REL. OLIVER IRON MINING COMPANY v. DISTRICT COURT FOR ST. LOUIS COUNTY AND OTHERS.[1]

October 12, 1917.

No. 20,651.

Workmen's Compensation Act — violent death — accident or suicide.

When violent death is shown, the presumption arises that it was not self-inflicted. As between accident and suicide, the law supposes accident until the contrary is shown. The evidence in this case is not conclusive of suicide and sustains a finding of accident.

Upon the relation of the Oliver Iron Mining Company the supreme court granted its writ of certiorari, directed to the district court for St. Louis county, to review the proceedings in that court, Hughes, J., under the Workmen's Compensation Act brought by Aloijzi Arko, widow of Vinko Arko, employee, against relator, as employer, for the death of her husband. Affirmed.

Alger R. Syme, for relator.

L. R. Simons, for respondent.

HALLAM, J.

Vinko Arko was employed by the Oliver Iron Mining Company as an underground miner. He worked with another employee, Joe Grum. They would blast and then shovel the loose earth and ore. They used for blasting, dynamite, fuses and dynamite caps. The dynamite was

[1]Reported in 164 N. W. 582.

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kept near by in a box, under lock and key. On the morning of February 29, 1917, the two men were engaged in shoveling ore that had been loosened by a blast. Shortly after they started work, Arko left his work and went to a "cross cut", a usual thing for that time of the day. In a few minutes an explosion was heard and Arko was about 100 feet from his place of work lying on the ground, dead, his chest and vitals badly torn by explosion.

The trial court allowed compensation under the compensation act to Arko's wife. The employer brings certiorari. The assignments of error raise the one question whether the death of deceased was caused by accident arising out of and in the course of his employment, or by suicide. If the death was caused by accident there seems small doubt that it was an accident arising out of and in the course of the employment. The question in the case is, therefore, was the cause of the death accident or suicide?

No one saw the occurrence and the circumstantial evidence is very meager. There was no occasion to use explosives for blasting at that time and there would be none until the loose dirt and ore had been shoveled out. This would take about two hours. There was therefore no occasion for deceased to go for explosives at that time or for him to have them on his person. There is evidence that two burnt out fuses, such as were used in exploding dynamite, were found lying near his body, though this is denied. The box containing the explosives was locked, but the key was in Grum's jacket and this lay on the box so that deceased had easy access to it. There is evidence that deceased "wasn't feeling just right" and "didn't look * * * just like natural" that morning. When found he was lying on his back in a position in which it is argued he would not be likely to accidentally fall and there was blood on the drift directly above him, but none on the sides, and from this it is contended that he must have been lying in that position when the explosion occurred. Relator argues that deceased must have gone to the box and obtained explosives, and that he then lay on his back and deliberately committed suicide.

On the other hand the evidence shows that, after the explosion, Grum found his jacket on the dynamite box in the same place as he left it when he went to work, with nothing to indicate that it had been dis-

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turbed. There is evidence that deceased, as did other men also, sometimes carried dynamite caps in his pockets and that these easily explode. There is some evidence that the explosion of dynamite caps was sufficient to cause the injury which deceased suffered, though this is denied. The evidence is that the clothing and watch of deceased were blown outward, indicating that the explosive that killed him was carried in or under his clothing.

Other facts and circumstances are mentioned in the testimony, most of them unimportant and none or all of them conclusive of either theory. If death is not the result of suicide, the employer must respond. The evidence may be too meager to establish affirmatively either accident or suicide, but, when violent death is shown, the presumption arises that it was not self-inflicted. "As between accident and suicide the law for logical and sensible reasons supposes accident," until the contrary is shown. McAlpine v. Fidelity & Casualty Co. 134 Minn. 192, 158 N. W. 967; Hale v. Life Ind. & Inv. Co. 61 Minn. 516, 63 N. W. 1108, 52 Am. St. 616; Lindahl v. Supreme Court I. O. F. 100 Minn. 87, 110 N. W. 358, 8 L.R.A.(N.S.) 916, 117 Am. St. 666; Kornig v. Western Life Indemnity Co. 102 Minn. 31, 112 N. W. 1039; O'Connor v. Modern Woodmen of America, 110 Minn. 18, 124 N. W. 454, 25 L.R.A.(N.S.) 1244; Peterson v. Prudential Ins. Co. 115 Minn. 232, 132 N. W. 277; Gilbert v. City of Tracy, 115 Minn. 443, 132 N. W. 752; Milwaukee W. Fuel Co. v. Industrial Com. 159 Wis. 635, 150 N. W. 998. The evidence is surely not conclusive of suicide. We conclude that the determination of the trial court that death was accidental is sustained.

Judgment affirmed.

NORTHWESTERN MUTUAL INVESTMENT COMPANY v. R. AYLMER.[1]

October 19, 1917.

No. 19,997.

Judgment — amendment — replevin — right to possession.

In an action of replevin a verdict was directed and judgment was

[1]Reported in 164 N. W. 661.

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entered for the plaintiff for the recovery of possession of property located in a certain building. No issue was tried by the jury. The plaintiff offered no evidence of right of possession except a chattel mortgage covering property contained in the building at its date, but not after-acquired property, and no issue was tried as to the right of possession of property afterwards put with that mortgaged. By mistake and inadvertence a verdict was directed and judgment entered for the recovery of possession generally. On motion of the defendant made within the time for appeal the court, a judge other than the one presiding at the trial sitting, amended the judgment by limiting the recovery of possession to the property included in the mortgage. *Held* no error.

Action in the district court for Clay county to recover possession of certain personal property, or for $3,500 in case possession could not be had, and $200 for detention thereof. The case was tried before Parsons, J., who at the close of the testimony directed a verdict in favor of plaintiff. From an order amending the judgment, Roeser, J., plaintiff appealed. Affirmed.

C. G. Dosland and *Lawrence & Murphy,* for appellant.

N. I. Johnson and *F. H. Peterson,* for respondent.

DIBELL, C.

This is an appeal by the plaintiff from an order amending a judgment.

The action in which judgment was entered was commenced on November 20, 1914, to recover possession of personal property in a garage at Moorhead. The complaint specifically described certain property and also "all tools, materials, stock, equipment, machinery, fixtures and personal property, except automobiles," contained in the garage. On February 17, 1916, judgment was entered adjudging that the plaintiff recover possession. On June 26, 1916, upon motion of the defendant, the judgment was amended so as to include only the property in the garage on March 20, 1914, that being the date of the chattel mortgage under which the plaintiff claimed the right of possession. Upon the hearing of this motion it was shown that at the trial the defendant withdrew his answer, that no evidence except the chattel mortgage was introduced, and that the court directed a verdict in favor of the plaintiff, pursuant to which the judgment was entered. The verdict was for the

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possession of "the property described in the complaint." The judgment described the property in detail as it was described in the complaint. The defendant offered no evidence in opposition to the showing made and the motion was granted.

It is entirely clear that the litigation was upon the right of possession of the property described in the mortgage and not of that acquired after the mortgage and placed in the garage. By mere mistake and inadvertence of the court the verdict and judgment were not limited to the subject matter of the litigation. The finding of the jury was directed by the court and except as directed by the court the jury found nothing. There was no error in granting the motion. In some respects the situation is much like that involved in Schloss v. George E. Lennon, Inc. 123 Minn. 420, 144 N. W. 148, where it was held that the mistake, considered to be a clerical one, could be corrected even after the time to appeal had expired. Other cases of value are Wright v. Krabbenhoft, 104 Minn. 460, 116 N. W. 940; Mouat v. Wells, 76 Minn. 438, 79 N. W. 499; Chase v. Whitten, 62 Minn. 498, 65 N. W. 84. The case of Miller v. Hogan, 81 Minn. 312, 84 N. W. 40, is distinguished. There the jury made an actual determination of a question of fact which it was sought to change on motion. The amendment was not ordered by the judge who presided at the trial but by another judge of the same district. We need not inquire when one judge may and when he may not amend a judgment entered pursuant to the direction of another judge. From the showing made on the hearing of the motion but one result could reasonably follow.

Order affirmed.

ALUMINUM PRODUCTS COMPANY v. A. E. ANDERSON.[1]

October 19, 1917.

No. 20,253.

Principal and agent — sale by principal — agent's right to commission.

1. Plaintiff, an Illinois corporation, appointed defendant exclusive representative for the sale of its products in the states of Minnesota

[1]Reported in 164 N. W. 663.

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and Iowa, agreeing to pay a stated commission on accepted orders. Defendant had attempted without success to obtain an order from a certain Minneapolis dealer; thereafter while in Chicago a representative of said dealer gave an order for plaintiff's products to an agent of plaintiff whom he met there, which order was filled by plaintiff and shipped to the dealer at Minneapolis. It is *held* that defendant was not entitled to a commission on this order.

Same — striking out evidence.

2. It was not error to strike out the evidence in regard to a claim of defendant as not within the issues made by the pleadings.

Principal and agent — amount of agent's commissions.

3. The record fails to show that defendant was entitled to commissions in excess of the amount allowed by the trial court.

Action in the municipal court of Minneapolis to recover $485.29 for goods sold and delivered. The answer set up counterclaims for $447.31. The case was tried before Montgomery, J., who at the close of the testimony directed a verdict in favor of plaintiff for $326.10, with interest. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Carl C. Meixner and *Charles A. Dalby,* for appellant.

Allen & Fletcher, for respondent.

BUNN, J.

At the close of the testimony the trial court directed a verdict for plaintiff in the sum of $326.10 with interest. The jury returned its verdict as instructed, and defendant appeals from an order denying a new trial.

Plaintiff is an Illinois corporation engaged in the manufacture and sale of aluminum ware. Defendant lives in Minneapolis, and, in the years 1914 and 1915, was plaintiff's agent for the sale of its goods to the trade in Minnesota and Iowa, under a contract the material parts of which are as follows:

"We hereby appoint you exclusive representative for the sale of our product in the states of Minnesota and Iowa on the following basis: We allowing you a 25 per cent commission on all accepted orders where sold at list 'B' prices to the Hardware, Department Store, Crockery and

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Hardware Jobbing Trade. * * *

"Commissions on all accepted orders to be paid on the 1st and 15th of each month following date of shipment.

"Shipments to you direct, terms; * * *

"In view of our giving you the exclusive control of our goods in the above mentioned territory, it is understood that you will give its sale your undivided attention.

"It is understood that all accepted orders will have our immediate attention, shipments being made as soon as possible after receipt."

We have italicized words in the above instrument that are important on this appeal.

Defendant employed agents and made sales through them and personally during 1914 and part of 1915. A disagreement arose between him and plaintiff over the account between them and defendant severed his connection with the business. Plaintiff then brought this action to recover a balance of $485.29 alleged to be due for goods sold and delivered to defendant. On the trial it was stipulated that the sum of $412.88 was due from defendant on this cause of action. Defendant had interposed counterclaims amounting to $447.31, mainly claims for commissions on sales claimed to have been made by him. The trial court allowed defendant $99.02 on these counterclaims, and directed the verdict for the difference between that sum and the $412.88 admitted to be due plaintiff for goods sold to defendant. Defendant claims on this appeal that this was error, that he was entitled to various commission credits beyond those allowed by the trial court, or at least that there were questions for the jury on the disputed items.

1. The largest of those items presents the main question, and one that is not free from doubt. Defendant had tried without success to obtain an order from Hartman Furniture & Carpet Company in Minneapolis. Thereafter a representative of that house was in Chicago attending a furniture convention where he met a Mr. Hooven of Pittsburg, an eastern sales agent of plaintiff. Through his efforts a sale aggregating $705 was made to the Hartman Company, and the goods were afterwards shipped to that company at Minneapolis. Defendant, on discovering this sale, asked a commission thereon, and was allowed 2 per cent and no more. He claims that under his contract with plaintiff he was entitled

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to 25 per cent on this sale. It will be noted that the sale was not made in defendant's territory, but was made to a house located in that territory, and the goods shipped there. Counsel relies upon language of the contract which we have above italicized and here repeat:

"We hereby appoint you exclusive representative for the sale of our product." "In view of our giving you the exclusive control of our goods in the above mentioned territory."

There is nothing controlling in the Minnesota cases. It is well settled in this state, though the authorities elsewhere are not wholly in accord (see Bluthenthal v. Bridges, 91 Ark. 212, 120 S. W. 974, 24 L.R.A.[N.S.] 279) that a broker who is given the exclusive right to sell a particular piece of real estate, or to procure a loan, is not entitled to a commission when the principal himself makes a sale or procures the loan, unless the agent was the procuring cause. This is true although the broker in fact finds a purchaser or lender after the principal does but before the broker has notice of this. Dole v. Sherwood, 41 Minn. 535, 43 N. W. 569, 5 L.R.A. 720, 16 Am. St. 731; 3 Notes on Minn. Reports, 171; Baars v. Hyland, 65 Minn. 150, 67 N. W. 1148; Mott v. Ferguson, 92 Minn. 201, 99 N. W. 804. The principal cannot employ another agent to sell the property or procure the loan, but he is not prevented from doing so himself merely because he has given the broker an exclusive agency. Doubtless the same rule applies to an exclusive agency to sell a particular article of personal property, and probably to a case like that at bar, where the exclusive agency is to sell goods of the principal within a certain territory. Plainly the principal cannot employ other agents to sell in the same territory without being liable to the first agent, but a sale by himself would not entitle the agent to a commission, unless the latter had done something towards making the sale. In Turnbull v. Northwestern Terra Cotta Co. 46 Minn. 513, 49 N. W. 229, it seems to have been conceded, or at least assumed, that an exclusive agency to plaintiff to sell defendant's wares at a specified commission within certain territory would entitle plaintiff to the commission on sales made within the territory by defendant himself. That was not decided, however, the only question on the appeal being as to whether the evidence sustained the finding of the jury that the agency was exclusive. The other Minnesota cases cited, Norris v. Clark, 33 Minn. 476, 24 N. W. 128, and Sutton

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v. Baker, 91 Minn. 12, 97 N. W. 420, have no bearing on the question.

The authorities from other states are apparently if not in fact conflicting. The trial court relied on Haynes Automobile Co. v. Woodill Auto Co. 163 Cal. 102, 124 Pac. 717, 40 L.R.A.(N.S.) 971. In that case the contract gave defendant the exclusive sale of Haynes' cars in Los Angeles and southern California. A resident of Los Angeles, while in Chicago, ordered a car from plaintiff at its factory in Indiana. The car was paid for there and shipped to the purchaser at Los Angeles. The court held that defendant was not entitled to a commission on this sale. The only possible distinction between this case and the one at bar is found in the language: "In view of our giving you the exclusive control of our goods in the above mentioned territory" in the contract before us. The most that can be claimed for this language is that it throws light on what was meant by "exclusive representative for the sale of our product." We are unable to see that the latter expression clarifies the former, much less that it changes its meaning. The situation was simply that defendant was given the exclusive agency to sell plaintiff's wares in a certain territory. The Haynes case is really on all fours with this. Among the cases cited by the court for its decision in that case is Golden Gate Packing Co. v. Farmers Union, 55 Cal. 606, a case much like the one at bar in its facts. This case was cited by Justice Mitchell in Dole v. Sherwood, to the proposition that an exclusive agency merely prohibits the placing of the property for sale in the hands of any other agent, but not the sale of the property by the owner himself. Other decisions are cited in the note in L.R.A. which lend support to the Haynes decision. The cases looking the other way must be considered in the light of the settled doctrine of this court established by Dole v. Sherwood, supra, and succeeding cases, as well as the light of the particular facts in each case. The contract involved in Garfield v. Peerless Motor C. Co. 189 Mass. 395, 75 N. E. 695, was interpreted in the light of evidence as to trade usage. In spite of some claim to the contrary, we find no such evidence in the present case. In Marshall v. Canadian Cordage & Mnfg. Co. 160 Ill. App. 114; Illsley v. Peerless Motor C. Co. 177 Ill. App. 459, and W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 N. W. 918, as well as in Garfield v. Peerless Motor C. Co., there were peculiar provisions in the contracts which convinced the courts that it

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was intended that the agent should have a commission on each sale to a resident of his territory, no matter by whom or where made. See 2 C. J. 777, for a discussion of the question and a full list of authorities.

It is needless to further discuss authorities. It is the view of a majority of the court that the trial court correctly ruled out the claim of a commission on the Hartman sale. That sale was made outside of defendant's territory. There was no intention whatever to prevent his making a sale to this customer. He had tried and failed. He had done nothing to earn the commission, and there is no evidence that he ever would have earned it. It can make no difference that the order was secured by another agent of plaintiff, so long as there was no attempt to invade defendant's territory.

2. As to the next item which defendant claims the right to recover, it is somewhat difficult to understand the facts from the record in this court. This is the Adams item. Defendant gave some testimony to the effect that Adams was his agent for northern Minnesota, that he had advanced to him $288, that of this sum Adams refused to pay back $145, claiming this as his commissions on goods sold. Defendant made claim of this sum from plaintiff, but it was not allowed. The testimony as to this item was stricken out on the ground that it was not admissible under the pleadings. The record fails to show that there was any error here or in the court's refusal to allow an amendment to the answer.

3. We have carefully examined the evidence in regard to the numerous smaller items that defendant claims. It is rather confusing, but we feel reasonably safe in saying that the record returned to this court fails to show that the trial court erred in not allowing defendant anything in excess of $99.08 on these items. This amount, with what was credited defendant in fixing the amount of plaintiff's claim at $412.88, seems to cover everything that on defendant's testimony can be called commissions on accepted orders.

Order affirmed.

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R. AYLMER v. NORTHWESTERN MUTUAL INVESTMENT COMPANY.[1]

October 19, 1917.

No. 20,295—(261).

Chattel mortgage — mingling unmortgaged and mortgaged goods — instruction.

1. In an action by a chattel mortgagor against his mortgagee for the conversion of property acquired by him after the mortgage, and placed with that mortgaged, and taken possession of by the mortgagee with that mortgaged, the evidence did not show that the mortgaged and unmortgaged property were so mingled and confused that it was error to refuse a peremptory instruction for the defendant under the doctrine that a mortgagor, who mingles his other property with that mortgaged so that a confusion of goods results, cannot claim that not mortgaged unless he separates it from the other and that the mortgagee is not a wrongdoer in taking all of it.

Same — trover and conversion — peremptory instruction.

2. Nor did it require a peremptory instruction for the defendant because no demand was made nor was the evidence insufficient to sustain a finding of conversion.

Same — action for loss of accounts.

3. A cause of action for damages for the loss of accounts alleged to have been caused by the defendant taking possession of the plaintiff's books of account is *held* unsustained.

Same — action for loss on contracts.

4. A cause of action for loss upon certain unfinished contracts alleged to have been caused by the defendant taking possession of the plaintiff's property is *held* unsustained.

Action in the district court for Clay county to recover $15,315. The case was tried before Roeser, J., who at the close of the testimony denied defendant's motion for directed verdicts on the fourth, sixth and seventh causes of action, and a jury which returned a verdict in favor of plaintiff

[1]Reported in 164 N. W. 659.

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for $2,630. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed in part and reversed in part.

M. Victor Oleson, Christian G. Dosland and *Lawrence & Murphy,* for appellant.

N. I. Johnson and *F. H. Peterson,* for respondent.

DIBELL, C.

This was an action to recover upon eight causes of action. All except the first, second, fourth, sixth and seventh were disposed of at the trial. Upon these separate verdicts were returned by the jury for the plaintiff. The defendant appeals from the order denying his alternative motion for judgment or a new trial. The briefs do not discuss the first and second causes of action and under the rule they will not be considered. The fourth, sixth and seventh are for consideration.

1. The fourth cause of action is for the conversion of personal property located in a garage at Moorhead. On March 20, 1914, the plaintiff gave the defendant a mortgage upon certain property then located in the garage. In November following the defendant took possession under the mortgage and the plaintiff's claim is that it took possession of property after acquired and not covered by the mortgage. This after-acquired property is that for the conversion of which suit is brought. There was a verdict for the plaintiff for $2,190.

After the execution of the chattel mortgage the plaintiff put other property in the garage and it was used in connection therewith. Of some of this after-acquired property the defendant took possession when it commenced its foreclosure and it purchased it at the sale. The situation indicates that the parties anticipated that the plaintiff would put additional property in the garage. He did not act wrongfully or negligently in mingling it with the other. The mortgagee invokes the doctrine that when a mortgagor mingles his other property with that mortgaged so that a confusion of goods results he cannot claim the property not covered by the mortgage unless he separates it from the other and that the mortgagee is not a wrongdoer in taking it all. Gibson v. McIntire, 110 Iowa, 417, 81 N. W. 699; Fuller v. Paige, 26 Ill. 358, 79 Am. Dec. 379; Burns v. Campbell, 71 Ala. 271; Adams v. Wildes, 107 Mass. 123; Kreth

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v. Rogers, 101 N. C. 263, 7 S. E. 682; Jones, Chattel Mortgages (5th ed.) § 481, et seq.; 8 Cyc. 574; note Ann. Cas. 1913E, 668; 5 R. C. L. 1049, et seq.; 4 Dec. Dig. Confusion of Goods, § 9; 10 Cent. Dig. Id. § 13. We need not inquire the extent and precise limits of this doctrine, nor the effect of the fact that the parties anticipated that property would be added, nor the fact that the plaintiff acted without fraud or negligence. The evidence does not show that there was such a confusion of property that that mortgaged and that after acquired could not be distinguished and that the defendant could not separate that covered by its mortgage; at least it does not show that there could not have been a substantial separation; and it does appear that at least to a very considerable extent that mortgaged and that unmortgaged could be distinguished. With the evidence so it was not error to refuse a peremptory instruction to find for the defendant upon the ground of a confusion of goods by the plaintiff.

2. Nor was it error to refuse a peremptory instruction for the defendant upon the theory that the plaintiff made no sufficient demand or that the evidence was insufficient to sustain a finding of conversion.

The sheriff took possession under the authorization of the defendant. It does not appear that it directed the sheriff what property to take but the evidence sustains a finding that from then on it was concerned in the retention of possession. It was present at the sale and purchased. It does not affirmatively appear that it might not have separated the mortgaged from the unmortgaged property. The evidence is such as to sustain a finding of actual conversion. It was not error to refuse to direct a verdict because of a want of demand or because a conversion was not proved. Nor is the verdict so unsupported by the evidence as to the amount converted that we should interfere.

3. The sixth cause of action is for the recovery of damages for the detention of the plaintiff's books of account which were in the garage at the time of the foreclosure and of which the defendant took possession. The plaintiff's claim is that he was unable to collect his accounts which they evidenced and thereby was damaged. The jury awarded him $125. The evidence is altogether too uncertain to sustain a verdict. The plaintiff was out of possession but a few weeks. It does not appear but that he might have had access to the books if he had chosen and it is entirely

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speculative whether he in fact lost by not pressing his accounts during the short time when he did not have the books. The litigation upon this cause of action should be at an end and judgment should go for the defendant notwithstanding the verdict of the jury.

4. The seventh cause of action is for damages sustained by the plaintiff because he was prevented from completing certain work in progress when the defendant took possession of the garage. Possession was taken before the termination of the action in unlawful detainer brought to recover possession. The jury awarded $200. The evidence is that at the time the plaintiff had on hand some unfinished work. It is entirely problematical whether he suffered any definite damages by being deprived of the use of the garage during the few days, or if so the amount of it. Litigation over this cause of action, like that over the sixth, should be ended by an entry of judgment notwithstanding.

All of the assignments of error have been considered. Those not discussed are not of a character requiring specific mention.

The order denying defendant's alternative motion for judgment notwithstanding the verdict or a new trial is reversed as to the sixth and seventh causes of action with directions to enter judgment in favor of the defendant nothwithstanding the verdict and it is affirmed as to the first, second and fourth causes of action.

Affirmed in part and reversed in part.

FRED W. CARLSTROM v. NORTH STAR CONCRETE COMPANY.[1]

October 19, 1917.

No. 20,445.

Negligence — refilling ditch — no question for jury.

The evidence in this case was insufficient to warrant submitting to the jury the question whether defendant, engaged in constructing a tile ditch across plaintiff's pasture under contract with the county, was negligent in not refilling the ditch before a cow of plaintiff fell into it.

[1]Reported on 164 N. W. 661.

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Action in the district court for Blue Earth county to recover $75 for the loss of a cow which was killed by falling into a ditch which defendant was building upon plaintiff's land. The answer alleged that the work was done by a subcontractor according to the terms of a contract between defendant and the county of Blue Earth, and if plaintiff suffered any damage it was solely on account of his failure to exercise due care in the premises. The case was tried before Comstock, J., who when plaintiff rested denied defendant's motion to dismiss the action, and at the close of the testimony defendant's motion for a directed verdict, and a jury which returned a verdict for $40. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

H. L. & J. W. Schmitt, for appellant.

Ivan Bowen and *Le Roy Bowen,* for respondent.

BUNN, J.

Defendant had the contract for constructing a tile ditch established by the board of county commissioners of Blue Earth county. This ditch crossed plaintiff's pasture. It was some 6 feet deep and about 2 feet wide. The ditch had been dug and the tile laid across the pasture in the latter part of August, 1914. As the tile was laid it was covered with a foot or so of dirt, but the ditch was not filled in, or "backfilled", until late October or early November. Plaintiff kept his cattle in the pasture during all this time. They were accustomed to jump the ditch. On October 4 a cow that plaintiff had purchased shortly before, and which had been in the pasture but 3 days, fell into the ditch and was killed. This action was brought to recover her value.

Defendant moved for a directed verdict, which was denied. The trial court submitted the case to the jury on the question whether defendant was negligent in not backfilling the ditch prior to the time the accident happened. There was a verdict of $40 for plaintiff. The court denied a motion for judgment notwithstanding the verdict and defendant appealed from the judgment thereafter entered.

It is clear that there is no ground for liability unless upon the theory on which the case went to the jury. The contractor was not bound to build fences or provide crossings. If the theory of the trial court is un-

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tenable, judgment should be entered for the defendant. Was there any breach of duty in the contractor's not filling in the ditch before the time the accident happened? That was a period of about 6 weeks after the tile was laid and covered with a foot or two of earth. There is no statutory provision that bears upon the time when the ditch shall be filled. Plaintiff relies upon a clause in the specifications attached to the contract. We fail to see that it has anything to say as to the time the trench shall be filled. There is no evidence that the time for completing the work had expired. There was evidence that it is customary and good practice to postpone refilling until rains have washed the loose dirt under the sides of the tile, filling up the hollow places underneath caused by the facts that the tile is round and the trench has square corners at the bottom. Just how long it should be before the dirt on top is shoveled in and the ditch filled up may depend on weather conditions. It is conceivable that the delay might be so great as to be unjustified and that there might be a basis for liability to one injured by falling in the trench. But we do not think that the extent of the delay in this case, when, for all that appears, there was still plenty of time to do the work before the time for completing the contract expired and before freezing interfered, was sufficient to warrant submitting to a jury the question of defendant's negligence. No authorities are cited that are at all in point, and we know of none. The conclusion reached makes it unnecessary to decide the question of contributory negligence, or that of independent contractor. We see no possible ground of liability under the facts in this case.

Judgment reversed, and judgment for defendant ordered.

SPENCER B. KAY v. WILLIAM ELSHOLTZ.[1]

October 19, 1917.

No. 20,464.

Service of answer by mail — postmark evidence of time of posting.

1. The defendant moved to vacate a default judgment upon the

[1]Reported in 164 N. W. 665.

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ground that it was entered after he had served his answer and when he was not in default. His evidence was that his answer, which was served by mail, was deposited in the proper post office on the last day for answering. If so deposited there was service. The evidence of the plaintiff was that it was not received until three days after the time for answering. The postmark on the envelope bore date two days after. The postmark was evidence of the time of mailing and the finding of the court that the answer was not served in time is *held* sustained.

Order not appealable.

2. An order denying a motion for a change of venue is not appealable.

Judgment by default was entered in the district court for Hennepin county. From an order denying his motion to vacate the judgment and for a change of venue to Clay county, Fish, J., defendant appealed. Affirmed.

W. George Hammett, for appellant.

S. B. Kay, for respondent.

DIBELL, C.

This is an appeal by the defendant from an order denying his motion to vacate a default judgment upon the ground that it was entered after the proper service of his answer and when he was not in default and for a change of venue.

1. Judgment was entered in favor of the plaintiff on January 18, 1917. The defendant lived in Clay county. Summons was served on him on December 26, 1916. The time in which he might answer expired 20 days after service, that is, on January 15, 1917. His claim is that on that date his answer was mailed from the village of Hawley, Clay county, the residence of his counsel, to the plaintiff's counsel at Minneapolis. If so, his answer was in time, for under the statute mailing is service. G. S. 1913, § 7745. Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. 381; Hoff v. Northwestern Ele. Co. 120 Minn. 224, 139 N. W. 153. The plaintiff made a showing to the effect that the answer was received by mail on January 18, but after the judgment had been entered, and that the envelope in which it came was postmarked January 17. The postmark was evidence of the date of mailing or at least evidence

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that it was not mailed as early as January 15. 3 Wigmore, Ev. § 2152; 2 Chamberlayne, Ev. § 1060; New Haven County Bank v. Mitchell, 15 Conn. 206; U. S. v. Noelke (C. C.) 1 Fed. 426; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, 3 Am. Rep. 445; Kirkland v. State, 141 Ala. 45, 37 South. 352. Upon the showing made by the parties the court found that the defendant was mistaken as to the date of mailing and that service was not within time. Its finding is sustained.

2. Accompanying the answer was an affidavit and demand for change of venue. An order denying a motion for a change of venue is not appealable. Allis v. White, 59 Minn. 97, 60 N. W. 809; 1 Dunnell, Minn. Dig. § 309.

So far as the appeal involves a review of the denial of the motion for a change of venue it is dismissed. So far as the order is a denial of the motion to vacate the judgment it is affirmed.

Order affirmed.

NELLIE BENOE v. DULUTH STREET RAILWAY COMPANY.[1]

October 19, 1917.

No. 20,482.

Street railway — negligence of company question for jury.

1. The question of the negligence of the defendant was one for the jury under the evidence.

Same — damages claimed too remote.

2. This being an action to recover damages for injuries to the person of plaintiff, caused by the alleged negligence of the defendant, held, that the expense of a trip to California, under the evidence in this case, cannot be considered such damages as are the natural and proximate consequences of the wrongful act, and is too remote.

Action in the district court for St. Louis county to recover $2,800 for injuries sustained while alighting from defendant's street car. The answer alleged the accident was caused by plaintiff's own carelessness.

[1]Reported in 164 N. W. 662.

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The case was tried before Fesler, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for $1,000. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and new trial granted.

Thomas S. Wood and *G. A. E. Finlayson,* for appellant.

John Jenswold and *John D. Jenswold,* for respondent.

QUINN, J.

This action is one to recover damages for injuries to the person of the plaintiff, caused, as she alleges, by the negligence of the defendant, its agents and servants, in the management and operation of one of its street cars on which plaintiff was a passenger. The alleged negligent act is that of causing or allowing the car to lurch back as plaintiff was in the act of getting off, thereby jerking and causing her to fall and injure her person. The plaintiff had a verdict, and defendant appealed from an order denying its motions for judgment notwithstanding the verdict or for a new trial.

Several questions are raised in this court, but only two of them will be considered, as we conclude that a new trial must be granted. We are of the opinion that, when considered all together, the testimony bearing upon the question of negligence was for the jury. Plaintiff was on her way home from her day's work, riding on a car provided with a door separating the body of the car from the vestibule platform. There were two steps down from the platform and two gates; also a handrail at the end of the car extending down on a line parallel with the steps. The car was traveling in a northeasterly direction on an up-grade. The plaintiff testified that, as the car was approaching Third street, she signaled it to stop, but before it stopped she left her seat and went to the rear door when the car came to a full stop; that after the car stopped she crossed the platform and started down the steps, with her left hand on the handrail for the purpose of steadying herself, and her purse and newspaper in her right hand; that she was about to go down through the gate nearest the body of the car, and that, while her left foot was on the upper step and she was in the act of stepping with her right foot down on to the lower step, the car jerked back with such suddenness that it threw her past

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the last step with her right foot on the ground. That she had hold of the rail and did not fall, but that it seemed as though her spinal column went through her head. That she tried to walk—in the first place she seemed to be blinded; then she tried to walk and after making two or three steps she could not walk any more, she had lost the use of her feet. That some lady then came to her assistance and assisted her until a gentleman came, who carried her to her room, and that about that time she lost consciousness. She further testified that there was no warning given or notice of any kind that the car was about to move backward; that it was standing still at the time she undertook to descend the steps, and that she was unable to say how far it lurched back, but it just seemed as if it were a partial revolution of a wheel, perhaps a foot back. There was other testimony to the effect that there was considerable of an up-grade in the track at the place in question, and that it had frequently happened that, where the motorman, without applying the current, would release the brakes while the car was standing on an up-grade, it would lurch back to some extent. We think the question as to negligence may be one for the jury.

The appellant's eighth assignment of error goes to the item of $650, expenses which plaintiff incurred on a trip to California in February, 1916. There is testimony tending to show that as a result of the accident complained of the plaintiff sustained an injury to her ankle; that she suffered a nervous condition attributable to the shock, a sprain of the neck and also some indication of a concussion of the spine. The injury occurred on August 4, 1915. She was attended by a trained nurse for four weeks and by Dr. Chapman for a number of months. At one time the doctor advised her that it was his opinion that "California for a time would be very good for her and an excellent way of rest to an otherwise too active nervous system." On February 21, plaintiff left for California and returned May 10, 1916. While there she took osteopathic treatments during the first month, and upon her return was much improved both mentally and physically. She testified at the trial that she could not say positively what the cost of the trip was, but that it was somewhere in the neighborhood of $650. In its charge the court said to the jury:

"You should also allow her for the expenses that have resulted to her

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from the injury which she there sustained, including the doctor's bill and the nurse's bill, and if in your judgment the trip she took to California was a curative agency which was necessitated or made a reasonable thing for her to do in order to recover from the injury which she there sustained, that would also be a proper subject for you to take into consideration in determining the amount of damages."

We are of the opinion that, under the testimony in this case, the submission of this item was error for which a new trial should be granted. The expense of the treatments which plaintiff took, if singled out from the general expense of the trip, would be proper for the jury to consider, but the general expense of a trip such as the plaintiff took cannot be considered, under the showing, such damages as are the natural and proximate consequences of the wrongful act complained of, the same being too remote.

The order is reversed and a new trial granted.

HOLT, J. (dissenting)

I do not think the instruction complained of should entitle defendant to a new trial. Without objection plaintiff testified to the expenses of the California trip. This included treatment for her injuries there. She also testified that the trip was taken upon the advice of her doctor as a means to recover from the effects of the injury. She is corroborated by the physician. Under this situation it seems to me there was nothing prejudicial in the charge.

CLARA B. LARSON v. WISCONSIN RAILWAY, LIGHT & POWER COMPANY.[1]

October 19, 1917.

No. 20,505.

New trial — newly discovered evidence — discretion of court.

1. **The granting of a new trial upon the ground of newly discovered** evidence is addressed largely to the discretion of the trial court, and

[1]Reported in 164 N. W. 666.

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where the same is merely cumulative, it was not error to refuse a new trial.

Reduced verdict not excessive.

2. The verdict as reduced by the trial court, *held* not excessive.

New trial — verdict not caused by passion.

3. In this case the verdict was not so excessive as to indicate that the jury were influenced by passion and prejudice in the determination of other issues, so as to require the granting of a new trial upon that ground.

Street railway — question of negligence for jury.

4. The testimony made a case for the jury upon the question of negligence.

Quotient verdict — amount of verdict not conclusive evidence.

5. While a quotient verdict is irregular, and would not be permitted to stand, yet the court will not set aside a verdict as a quotient simply on account of the amount thereof.

Action in the district court for Winona county to recover $5,190 for injuries received in alighting from defendant's street car. The case was tried before Granger, J., and a jury which returned a verdict for $3,037.50. From an order denying its motion for a new trial if plaintiff consented to a reduction of the verdict to $2,060, defendant appealed. Affirmed.

Webber & Lees, for appellant.

Henry M. Lamberton, for respondent.

QUINN, J.

This action is one to recover for injuries to the plaintiff, caused, as she alleges, through the negligence of the defendant, its agents and servants, in the management and operation of one of its street cars, upon which the plaintiff was a passenger. The negligence complained of is, that the motorman started the car while plaintiff was in the act of alighting therefrom, thereby causing her to fall and sustain the injuries complained of. The plaintiff had a verdict for $3,037.50. Upon motion of defendant, the trial court granted a new trial upon the ground that the amount of the verdict was excessive, it appearing to have been given under the influence of passion and prejudice, unless the plaintiff remit therefrom the sum of $977.50, in which case a new trial was denied. The

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plaintiff filed a stipulation consenting to the remittance, and defendant brings this appeal.

The appellant assigns as error: (1) That the court erred in denying defendant's motion for a new trial; (2) that the court erred, after expressly finding that the verdict was the result of passion and prejudice, in directing a judgment to be entered against the defendant for $2,060 on condition that plaintiff remit the balance; (3) that the verdict was not justified by the evidence and was contrary to law; (4) that the verdict was a quotient verdict and should be vacated for that reason.

There was testimony offered upon the trial, on behalf of the plaintiff, which tended to show: That plaintiff was 29 years of age, weighed about 190 pounds, and worked for her mother in a hair dressing establishment in the city of Winona. That at about two o'clock p. m. on December 4, 1915, plaintiff, in company with her mother, got onto the defendant's street car at the corner of Third and Main to go west to Fifth and McBride streets. That this car was so constructed, as we understand, that the passengers entered and got off through doors at the front right hand corner of the car—the entrance being farthest to the front and the exit immediately back of it, with a curved railing separating them—and when the doors closed the steps folded up. That when the plaintiff and her mother got onto the car they each had a bundle of five window shades which were placed on the platform near the motorman. That as the car approached the corner of Fifth and McBride streets the mother signaled the car to stop, and then went out onto the platform by the exit door, when plaintiff handed her one of their bundles over the railing, which the mother received and then got off the car. In the meantime plaintiff picked up the other bundle and started to get off the car through the exit when the door closed. She then asked the motorman to wait a minute, that she wanted to get off with her mother, and he then opened the entrance door, the one nearest to the plaintiff. The plaintiff testified: "I started to get off from the car. * * * I got down on the step with both feet and was in the act of putting the right foot to the ground when I felt the step jerk, and I was pitched forward onto the ground. * * * The car started, and the starting of the car and the step, both, was what pitched me forward on the ground, and I landed on my hands and knees and my right limb was twisted, the bone was resting on the ground."

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The street was smooth, dry and dusty where she fell and there was no snow or ice. The car started and stopped in an instant, and the motorman got off and he and another man helped her to Mrs. Wolf's house nearby. She called Dr. Lynch, who came with his car and took the plaintiff and her mother to the mother's office, where he cared for the plaintiff's foot. The plaintiff's testimony as to how the accident took place was fully corroborated by the testimony of the mother. The motorman and four passengers testified on behalf of the defendant. Their testimony was not in harmony as to how or just where plaintiff fell, but they testified that the car did not start and stop as claimed by plaintiff. In this particular there was a sharp conflict in the testimony. There is testimony that plaintiff was confined to her bed for four weeks, and sat in a chair for nine weeks before she could put her foot to the floor; that she has been unable to stand on her foot to work since the injury, and that she has worn a bandage since the injury. Dr. Lynch testified, in effect, that the plaintiff had a dislocation of the right ankle; that the ligaments were torn loose on both sides; that the dislocation gave him a great deal of trouble and that she seemed to be in great pain, complaining of continual pain all the time; that the joint seemed to be much swollen and was black and blue; that after he set the joint and put it in splints she was put to bed where she remained for four weeks; that he cared for her for 13 weeks during which time she was unable to walk, and that he advised her to keep it bandaged as it did not seem to be as firm and solid as he expected it to be; that he did not think it would ever be as perfect as it was before, and that he thought it would always have to be supported by a bandage.

Dr. Lindsay testified that he examined plaintiff's ankle on the day before testifying, that it was bandaged rightly, that it was somewhat larger than the left one, somewhat limited as to motion, and that in his opinion she would never recover completely.

Dr. Rosenberry, called by the defendant, testified that he examined the plaintiff at the noon recess of court; that he could not see very much wrong with the ankle; that there was no swelling or deformity and apparently slight limitation of motion, and that he could not see that there should be any permanent injury there nor why she could not use her ankle then.

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Under its first assignment of error, the defendant urged that a new trial should have been granted: (1) On the ground of newly discovered evidence; (2) because the verdict was excessive and appeared to have been given under the influence of passion and prejudice; and (3) that the verdict was not justified by the evidence and was contrary to law. The granting of a new trial upon the ground of newly discovered evidence is addressed largely to the discretion of the trial court. 2 Dunnell, Minn. Dig. § 7123, and cases cited therein. The so-called newly discovered evidence was merely cumulative, and there was no abuse of discretion in the court's refusing a new trial upon that ground.

As to the amount of damages allowed, it appears that plaintiff was seriously injured and suffered much pain, incurred expense in trying to be cured and lost considerable time. The question of damages was submitted to the jury under careful instructions. The amount of the verdict was not so excessive, when compared with what the evidence reasonably tends to show, that it can be well said that the same was awarded without a fair and impartial consideration of the testimony. It is well settled that, in actions of this kind, the trial court may, in the exercise of a sound discretion, when it deems a verdict excessive and the result of passion and prejudice, deny a new trial on condition that the prevailing party remit such amount as shall leave the amount of recovery not excessive in the judgment of the court. But when the damages are so excessive and the circumstances disclosed by the evidence are such as to indicate a fair probability that the jury were influenced by passion and prejudice in the determination of the other issues, a new trial should be granted. We discovered no abuse of discretion on the part of the trial court in refusing to grant a new trial in this case. Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Pratt v. Pioneer Press Co. 35 Minn. 251, 28 N. W. 708; Goss v. Goss, 102 Minn. 346, 113 N. W. 690; Whitney v. Kaliske, 131 Minn. 261, 154 N. W. 1100.

We are of the opinion that the testimony made a case for the jury and that the verdict is justified by the evidence.

Appellant urges that the verdict was a quotient verdict and should be vacated for that reason. We are unable to agree with this contention. A quotient verdict is one where the jury agree in advance that each shall set down on paper the amount of damages which, in his opinion, should

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be allowed, the sum of such amounts to be divided by 12 and the quotient accepted as the verdict. 12 Cyc. 679. While a verdict so arrived at would be irregular and not permitted to stand, there is no showing that such was done in this case, and the court will not set aside a verdict as quotient simply by guessing that it was such on account of the amount thereof. 1 Minn. 131 (156), 61 Am. Dec. 494.

Affirmed.

HELEN O'LEARY v. ST. PAUL CITY RAILWAY COMPANY.[1]

October 19, 1917.

No. 20,510.

Street railway — verdict not sustained by evidence.

Plaintiff was injured while descending the steps of a street car. The evidence is not sufficient to show any defect in the step and a verdict for plaintiff cannot be sustained.

Action in the municipal court of St. Paul to recover $500 for injuries received while alighting from defendant's street car. The case was tried before Boerner, J., and a jury which returned a verdict for $250. From an order denying its motion for a new trial, defendant appealed. Reversed.

W. D. Dwyer, for appellant.

John J. Kirby, for respondent.

HALLAM, J.

Plaintiff was injured while alighting from one of defendant's street cars. Her claim is that there was a hole in one of the steps large enough to take in the heel of her shoe, that as she descended the steps of the car her heel caught in this hole, and that as a result the heel was torn from the shoe and she was thrown down. The jury found for plaintiff. From an order denying a new trial defendant appealed.

There is no doubt that plaintiff was thrown or fell. There is no doubt that the heel of her shoe was later found and the fair inference

[1]Reported in 164 N. W. 659.

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is that it was somehow caught and torn from her shoe. The one claim of negligence is that there was a hole in the step. If there was a hole in the step large enough to take in the heel of a shoe and the heel was caught in such a hole, this was proof of negligence on the part of defendant. But here we think the proof fails. The steps of this car were of the usual construction, made of iron and steel, with perforations five-eighths of an inch across, not quite large enough to admit an ordinary penny. There is no question that this was a proper construction. A hole large enough to take in the heel of a shoe would be relatively much larger, noticeably larger. There is no substantial evidence that there was any such hole. On this point there is no evidence on behalf of plaintiff other than that of plaintiff herself. At first she testified that "it appeared there was a hole there and the heel went down into it," and that a bystander pulled the heel out of the step and handed it to her. Once she said she tried to get the heel out herself, yet she gives no evidence as to the nature of the hole in the step. She said she "didn't see the hole in the step" and "didn't notice the condition of the steps in particular." In other words, there is no evidence that there was any hole or defect in the step, unless it may be inferred from the fact that the heel was somehow caught. The heel was not produced. Whether it was defective or worn does not appear. The fact that the heel was torn from the shoe does not prove a defect in the step. Heels are often torn from shoes from other causes. Plaintiff's evidence leaves the cause in the realm of conjecture. On the other hand, there are witnesses in considerable number who testified they examined the step and that it was in perfect condition. Some of these were employees of defendant. Some were not.

In this state of the record we are compelled to hold that there is not sufficient evidence as to a defect in the step to sustain the verdict.

Order reversed and new trial granted.

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WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY v. OTTO C. HOLT AND OTHERS.[1]

October 19, 1917.

No. 20,532.

Contract with members of grand jury — evidence insufficient.

1. That a grand jury received reports concerning crime conditions in the county from plaintiff, a detective agency, or heard the testimony of its detectives, or that some of its members made partial payments for the services it rendered, does not tend to establish a contract of employment between the plaintiff and the members of the grand jury personally; for such a contract, even if not void as against public policy, would be so at variance with the usual and fair procedure under the law that it ought not to be allowed to rest on inferences.

Witness — cross-examination of members of grand jury on duty.

2. A grand juror may not testify to conversations had when none but his fellow members were present relative to matters considered by them in the discharge of their duties. The secrecy enjoined by law in this respect is permanent.

Action in the district court for Hennepin county to recover $660.51 for services and expenses in making investigations for members of a grand jury. The answer of defendants other than defendant Albert was a general denial. The case was tried before Hale, J., who when plaintiff rested denied plaintiff's motion for a directed verdict and granted the motion of defendants for a directed verdict. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

Eugene S. Bibb, for appellant.

L. L. Longbrake, for respondents.

HOLT, J.

Plaintiff alleged that in the month of December, 1913, it made certain investigations at the special instance and request of defendants under an agreement that its operators should be paid a stated per diem

[1]Reported in 164 N. W. 590.

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charge and all reasonable expenses incurred in connection with the work; that the services and expenses were of the agreed value of $1,460.51, and that only $800 had been paid. The evidence received tended to establish that plaintiff operates a detective agency; that such agency investigated the conditions as to the prevalence of certain crimes in the city of Minneapolis in November and December, 1913, and produced evidence or reports to the grand jury of Hennepin county upon which indictments were found; and that during that time all the defendants were members of the grand jury then in charge of their duties as such. When this last fact appeared, plaintiff was not permitted to prove by members of the grand jury, called for cross-examination, what action was taken by that body or what conversations were had between the members thereof relative to authorizing their foreman to contract for the services rendered. This was done on the theory that as to any matter coming before a grand jury the action, vote and opinion of each juror thereon must forever be kept secret. Plaintiff appeals from the order denying a new trial, a verdict having been directed in favor of defendants.

Five defendants are not represented upon this appeal. The record shows service on but one of these five, namely, Allan D. Albert, the foreman of the grand jury, who answered separately. The attorney who served his answer withdrew from the case before the trial began. Appellant makes the point that a verdict should have been instructed against Albert. There is no service of the notice of appeal upon him or upon his attorney, hence the alleged error in directing a verdict in his favor cannot be considered upon this appeal.

Plaintiff asserts that the only legal question presented is: "Do the statutes and common law of this state make privileged and incompetent testimony showing the employment of a party to perform services for the members of a grand jury, either as grand jurymen, or as individuals, where the services to be performed relate to the investigation of public offenses?" We think a fair view of the record will eliminate the individual action of respondents in the alleged employment, and will also confine the question to the right to elicit from members of the grand jury conversations among themselves in reference to matters occurring in the discharge of their official duties. Plaintiff's manager, Mr. Trotter,

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took the witness stand. His testimony clearly indicates that plaintiff has no contract of employment other than one made by Mr. Trotter, acting for plaintiff, and defendant Albert, the foreman of the grand jury. When the first talk between Mr. Trotter and Mr. Albert took place, no one else was present, and the subsequent conversations between them were either at Albert's office or residence or at Trotter's office. No claim is now made that any other grand juror was present at any of these interviews, and no offer of proof was tendered on that point. The question then narrows down to this, whether it was competent to show by the two grand jurors, called for cross-examination under the statute, that the grand jury had delegated authority to its foreman to act for the members so as to bind each individually for the services sued for.

Respondents advanced the proposition that a contract such as claimed here is against public policy and void. It is ground for individual challenge against a grand juror that a state of mind exists on his part in reference to a case or to either party which shall satisfy the court, in the exercise of a sound discretion, that he cannot act impartially and without prejudice to the substantial rights of the party challenging. Subdivision 7, § 9110, G. S. 1913. Therefore, it is argued, a grand juror who makes himself personally liable for expenses incurred in ferreting out crime for the purpose of indicting persons guilty thereof cannot be said to be a proper grand juror. There is much force in the argument.

But we shall not now stop to inquire and determine whether a contract made by a grand juror or grand jury to finance the investigation of crimes through detective agencies is void as against public policy. It is enough to suggest that for grand jurors to personally finance criminal investigations is so at variance with the evident purpose of their work, under the theory of our criminal procedure and the practice of modern jurisprudence, that no contract so to do should be implied from the fact that reports were received and made use of by the grand jury, or from the fact that its foreman requested the same or any other service from outsiders. The foreman has no express or implied authority to incur expense for which the jury or the individual members will be liable. Moreover, the finding of an indictment calls for the judgment of fair minded, unprejudiced men. It is against the general consensus of opinion that

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ordinary men can act fairly and impartially when their purse has been placed on one side of the scale.

This consideration is also against lightly implying a contract from the conduct of the grand jury or its foreman: In investigating crimes the grand jury shall receive no other evidence than such as is given by witnesses produced and sworn before them and legal documentary evidence. They shall receive none but legal evidence to the exclusion of hearsay or secondary evidence (section 9117, G. S. 1913), and to secure that they may require the prosecuting attorney to issue process for the necessary witnesses. The grand jury, therefore, are forbidden to consider hearsay reports from detective agencies concerning crimes in determining whether or not indictments are to be found or presentments made. And if any person is in possession of evidence bearing upon crime he can be made to appear before the grand jury, and, for so doing, he receives the usual witness fees from the county as his only compensation. No inference may be drawn from statutory provisions or from the nature of the work to be performed by a grand jury, that they impliedly become personally responsible for any expense connected with criminal investigation. The small per diem and mileage which the law allows them as compensation precludes the thought that any expenditures connected with their duties may be chargeable to them, in the absence of an express agreement to the contrary. The county is the constituted agency to provide the means for the detection and prosecution of crime.

With these views as to the necessity of proving a specific agreement on the part of respondents in order to bind them personally, let us examine the question presented on this appeal. The testimony of the county attorney and the offer to prove by him that he was averse to spending any part of the small contingent fund at his disposal for the purpose of special investigation of the then existing crime conditions, does not tend to prove that respondents authorized their foreman to bind them personally to pay for plaintiff's services, hence no reversible error can be raised on the court's rulings with reference thereto. The respondent Bros, the clerk of the grand jury, was called for cross-examination under the statute, and asked if he remembered "talks had with the foreman of your grand jury among the members about the securing of evidence on resorts" in Minneapolis. The objection was made that the answer called

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for evidence which the statute does not permit to be disclosed. When the court observed that he did not think a member of the grand jury could testify as to what took place before such body, plaintiff's counsel stated: "If the court is going to hold that these defendants are not permitted to tell anything that went on in the grand jury room or among the grand jurors, with relation to hiring or employing these defendants, there is no possibility of proving a case." The court sustained the objection. Then plaintiff offered "to show by witness that the grand jury in session in November, 1913, and as citizens" authorized the employment alleged. An objection to the offer was sustained. This witness also testified that no talk concerning the information through plaintiff's agency took place among the defendants, in his presence, when the grand jury was not in session. Questions calling for the fact whether the witness had ever contributed towards paying plaintiff or whether, subsequent to the rendition of the services, defendants did not make some arrangement by which their fees as grand jurors were agreed to be applied upon plaintiff's claim, were also ruled out. For the reasons above stated, we think part payment or the application of their grand jury fees upon this claim does not tend to prove an original express authority to their foreman to bind each grand jury member to pay for these services.

We think it was not permissible to prove by this witness the conversations among the members of the grand jury, while in session, with reference to investigating crime conditions in Minneapolis or to the mode of procedure in so doing, whether to hire plaintiff or any other person to assist. Section 9123, G. S. 1913, reads: "Every grand juror shall keep secret whatever he himself or any other grand juror said, or in what manner he or any other grand juror voted, on a matter before them." The prescribed grand juror's oath obligates him to keep secret the counsel of the state and of himself and fellows. This seal of secrecy is permanent in respect to what is said by and between members of the grand jury in the performance of their duties. The object of the law is to protect the grand juror so that what he says or does in the presence of his fellows in the discharge of his official duties will never thereafter be used to his detriment. 4 Wigmore, Ev. § 2361; Edwards, Grand Jury, p. 166; Loveland v. Cooley, 59 Minn. 259, 260, 61 N. W. 138; People v. Thompson, 122 Mich. 411, 81 N. W. 344. Of course, this permanent secrecy

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does not obtain in respect to the testimony of witnesses examined before a grand jury.

The defendant Charles T. Stremel, a grand juror, was also called for cross-examination under the statute and interrogated in the same manner as Mr. Bros and, in substance, the same offer of proof made, with this exception: The witness was asked whether in the month of November, 1913, he remembered some talk had among the grand jurymen, while they were not in session as a grand jury, about the hiring of this plaintiff agency to investigate vice conditions in Minneapolis, to which an objection that it was incompetent and immaterial was sustained. The fair import of counsel's questions is to call for a conversation had between or in the presence of persons who were all then grand jurors, engaged in the performance of their duties as such. We think conversations of this sort entitled to the same privilege of secrecy, as those taking place at regular sessions of the jury. There is the same reason for the grand juror to keep secret the counsel of his fellows. Our conclusion is that the learned trial court committed no error when he refused to let the grand jurors disclose what was said between them, on occasions when none but grand jurors were present, with reference to authorizing their foreman to hire a detective agency to assist them in their investigation of crime or violations of law.

In what has been said it has been the aim to make clear that we confine the decision to conversations between or among grand jurors which occur when none but grand jurors are present.

Order affirmed.

AUGUST P. LENNARTZ AND ANOTHER v. JOHN McVEY MONTGOMERY.[1]

October 26, 1917.

Nos. 20,277—(162).

Homestead — sale contract executed by wife only — statute construed.

A contract for the sale of the homestead, of which the husband and

[1]Reported in 164 N. W. 899.

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wife are owners as joint tenants, is not invalid for all purposes upon the ground that the same was executed by the wife without the husband joining therein, under section 6961, G. S. 1913, the husband thereafter confirming the same and both husband and wife being ready and willing to perform the conditions thereof and offering so to do. The sole object of the statute is to prevent the alienation of the homestead without both husband and wife joining therein. The statute was not intended for the protection of the purchaser, and may be enforced against him by the wife, her husband being ready and willing to join with her therein.

Action in the district court for Hennepin county by August P. Lennartz and Elsie M. Lennartz to recover $500. The facts are stated in the opinion. The motion of plaintiffs for judgment on the pleadings was granted, Jelley, J. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

N. E. Pardee and *P. L. Solether,* for appellant.

C. E. Purdy, for respondents.

QUINN, J.

This is an action to recover the first deferred instalment on a contract for the sale of plaintiffs' homestead. After issue was joined the plaintiffs moved for judgment on the pleadings. The motion was granted. Judgment was so entered and defendant appealed.

The plaintiffs are husband and wife and on September 5, 1916, were owners as joint tenants of the premises referred to, which constituted their homestead. On that day the wife entered into a written contract with the defendant for the sale of their home for $6,250, payable as follows: $300 cash, which was paid; $500 October 1, 1916; $3,000 by the assumption of a mortgage thereon, and the balance in monthly instalments of $40. The seller was to furnish an abstract showing a marketable title in August P. Lennartz and Elsie M. Lennartz, his wife, and give possession October 1, 1916, upon payment of the $500 instalment, when the parties were to execute a contract for a deed in the usual form, embracing the provisions of the former contract.

September 20 plaintiffs delivered to defendant the key and abstract of title. September 23 defendant informed Mrs. Lennartz that he would not take the premises, demanded the return of the $300 which had been

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paid, and on that day brought an action to recover the same. On October 2, the first being on Sunday, plaintiffs tendered to defendant a contract for a deed of the premises executed by each of them in conformity with the requirements of the agreement, and requested the payment of the $500. The defendant refused to make payment or sign the contract.

All allegations of the complaint stand admitted by the answer, save that the wife acted as the agent of her husband, which is denied. It is not claimed that the transaction was in any manner tainted by fraud, or that defendant acted under any misapprehension of fact. The contract provided that the abstract show title in August P. Lennartz and Elsie M. Lennartz, his wife. Defendant alleges in his answer that plaintiffs were husband and wife, and that they owned and occupied the premises as their homestead during all the times mentioned in the complaint. The agreement is set out in full in the complaint.

Defendant contends that the contract is absolutely void under the statute, it being for the sale of the homestead and the husband not having signed the same. Section 6961 of the statute provides in part as follows: "But if the owner be married, no mortgage of the homestead, except for purchase money unpaid thereon, nor any sale or other alienation thereof, shall be valid without the signatures of both husband and wife." In the case of Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817, where the purchaser sought to recover damages from the husband for the refusal to perform a contract to convey the homestead, in which his wife did not join, Justice Mitchell, speaking for the court, said:

"We think that on legal principles such a contract must be held void for all purposes, and not to constitute the basis of any action against the obligor, * * *. While it is true * * * that to hold the husband liable for damages would not deprive him or his family of their homestead, yet to force him to the alternative of securing his wife's signature to the conveyance, or of being mulcted in damages for not doing so, and to place the wife in the dilemma of either having to sign the deed or see her husband thus mulcted in damages, might, and naturally would, often indirectly defeat the very object of the statute."

Thus it will be seen that the only question considered and determined in that case was whether the husband was liable in damages, to the grantee, for a failure to convey the homestead pursuant to a contract in

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which his wife did not join. In construing the statute, this court in that case stated:

"A contract to convey a homestead, executed by the husband alone, is not illegal in the sense of being prohibited as an offense. The illegality is not that which exists where the contract is in violation of public policy or of sound morals, or founded on an illegal consideration, which would vitiate the whole instrument. The sole object of the statute was to prevent the alienation of the homestead, without the wife's joining in the conveyance or contract. The policy of the law extends no further than merely to defeat what it does not permit. It merely withholds from the husband the power to alienate the homestead in that way, * * *."

Under this view of the statute it seems clear that the protection intended thereby inures to the owners of the homestead only. It was not intended for the protection of the purchaser, or to enable him to repudiate a contract which he had fairly entered into, so long as the owners of the homestead are ready and willing to carry out the same on their part.

In the present case the wife signed an instrument for the sale of the homestead; her husband did not sign, but thereafter he confirmed her act by offering performance thereof; neither has ever refused to perform the same, both have at all times been ready, willing and able to convey the premises according to the terms of the contract, and to keep and perform the conditions of the agreement, and have offered so to do. There is no issue between the parties as to these matters. We can see no reason why defendant should not keep his agreement. Keystone Iron Co. v. Logan, 55 Minn. 537, 57 N. W. 156; Stromme v. Rieck, 107 Minn. 177, 119 N. W. 948, 131 Am. St. 452; Davidson v. Hurty, 116 Minn. 280, 133 N. W. 863, 39 L.R.A.(N.S.) 324.

The Stromme case was for specific performance of a contract for the exchange of real property. Plaintiff owned real estate in Minneapolis. Gustav Rieck owned a farm in Anoka county. They entered into a written contract for the exchange of properties, plaintiff being represented in the transaction by her husband, who, as her agent, signed her name thereto. Defendant contended that the contract was void under the provisions of section 7147, G. S. 1913, which in part provides: "No contract between husband and wife relative to the real estate of either, or any interest therein * * * shall be valid * * *." This is the identical

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language used in section 6961 under consideration, and, in that case this court said:

"The contract in question was made on behalf of plaintiff by her husband acting as her agent, and no claim is made that she participated in the transaction. While it is clear under the statute referred to and the decisions of this court that the contract could not be enforced against Mrs. Stromme, still, under the doctrine of Keystone Iron Co. v. Logan, 55 Minn. 537, 57 N. W. 156, it may be enforced by her. It was held in that case that where the husband enters into a contract for the sale of his wife's real estate, and she thereafter confirms his act, and stands ready to perform, the other party cannot take advantage of the statute to repudiate the obligations undertaken by him. The facts of this case bring it within the rule there laid down. Here plaintiff's husband entered into the contract as her agent and she confirms his act, and stands ready to perform all the obligations imposed upon her by the writing. In this situation defendants are in no position to urge that the statute has been violated."

In Davidson v. Hurty, the same rule was recognized where the statute which prohibits contracts for the sale of real estate between husband and wife was under consideration. The court said:

"This statute does not enable a purchaser to recover back purchase money from a wife, paid pursuant to the terms of a contract for the sale of her real estate executed by the husband by signing her name; she being willing to comply therewith * * *. And it does not stand in the way of the enforcement by the wife of a contract for the sale of her real estate executed by her husband as her agent * * *. Such contracts are not void for all purposes."

If the purchaser cannot recover back money paid under such a contract, we are unable to see how he may revoke the contract after its execution and before the time of performance by merely serving a notice of his intention not to keep his promise.

Affirmed.

HOLT, J. (dissenting).

I dissent:

Courts should not undertake to specifically enforce a contract which has no existence in the eye of the law. Section 6961, G. S. 1913, pro-

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vides that no sale or other alienation of the homestead of a married owner shall be valid without the signature of both husband and wife. This so-called contract does not contain the signature of the husband. Our decisions hold a contract of sale or conveyance of the homestead so lacking to be absolutely void, not merely voidable. Barton v. Drake, 21 Minn. 299; Scanlon v. Oliver, 42 Minn. 538, 44 N. W. 1031; Law v. Butler, 44 Minn. 482, 47 N. W. 53, 9 L.R.A. 856; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817. In the case at bar the parties to the writing evidently realized the need of a contract signed by both husband and wife for there is a provision to that effect. But before the time arrived for delivery thereof, defendant, the purchaser, had given plaintiffs notice that he refused to go on with the deal. The tender by plaintiffs of a valid contract thereafter could have no more effect on the right to specific performance than would the tender of a deed in case of an oral contract for the sale of real estate. In the latter case it will be conceded that specific performance could not be had. Keystone Iron Co. v. Logan, 55 Minn. 537, 57 N. W. 156, and Stromme v. Rieck, 107 Minn. 177, 119 N. W. 948, 131 Am. St. 452, did not involve the sale of a homestead. And there was not in either of those cases a withdrawal from the negotiations by the vendee or refusal by him to proceed further in the transaction, as in the case at bar, prior to the ratification there held to render the contracts enforceable. Those cases as well as that of Unruh v. Roemer, 135 Minn. 127, 160 N. W. 251, proceed on the theory that a principal may ratify and adopt the act of an agent in executing a written contract for the sale of real estate, although the agent had no written authority to execute it at the time it was made. The ratification or adoption is considered accomplished by the act of instituting the suit for specific performance. But no sale of the homestead of a married person can be consummated by any other act than by the affixing of the signatures of both husband and wife to a written contract of sale or conveyance.

BROWN, C. J.

I concur in the dissent of Mr. Justice Holt.

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THOMAS J. ASHE v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

October 26, 1917.

No. 20,321.

Contributory negligence.

1. Plaintiff, a switchman in a yard with two tracks, called respectively the east bound and west bound tracks, was guarding his train approaching on the west bound track. He stood between the east and west bound tracks and within the sweep of an engine on the east bound track. There was no necessity of his standing so near that track, He knew that a train was due on that track in a minute or two, yet he stood with his back to it until it struck him. *Held*, he was guilty of contributory negligence.

Wanton negligence.

2. Defendant's trainmen on the east bound train saw plaintiff standing between the tracks but thought he was in the clear. Plaintiff too thought he was. There is no ground for a claim of wanton negligence on the part of defendant's trainmen.

Action in the district court for Ramsey county to recover $14,000 for injuries received while in the employ of Northern Pacific Railway Company. The answer alleged that plaintiff was negligent. The case was tried before Dickson, J., who at the close of the testimony granted defendant's motion for a directed verdict. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Douglas, Kennedy & Kennedy, for appellant.

M. D. Munn, for respondent.

HALLAM, J.

On December 26, 1915, plaintiff was employed by the Northern Pacific Railway Company, as switchman in one of its yards in St. Paul. Defendant operated its trains through this same yard. In the part of the yard where plaintiff was employed were two main tracks called the east

[1]Reported in 164 N. W. 803.

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bound and west bound main tracks. A spur, running easterly, branched from the west bound main track. Plaintiff's train was on the spur and was approaching the west bound main. It was plaintiff's duty to keep a lookout for trains coming from the Union depot on this same west bound track. If a train appeared, then he must stop it or stop his train. If none appeared he must set the switch for his train to pass from the spur to the west bound main and "line the switch back" after his train had passed it. On this occasion the west bound main was clear and plaintiff had set the switch for his train to pass from the spur to the main track. The train was passing over the switch in that movement. Plaintiff was standing between the west bound and the east bound main tracks. He stood about two feet from the east bound track, just near enough to be within the sweep of the pilot-beam of an engine on that track. Had he stood farther away, a distance estimated by different witnesses at from two to six inches, he would have been on safe ground. While he was standing in this position looking east, a train of defendant came on the east bound track and plaintiff was struck by the pilot-beam of the engine and injured. He sued for damages. The trial court directed a verdict for defendant. Plaintiff appeals.

There is some evidence of negligence on behalf of defendant in operating the train at excessive speed and without giving proper or customary warning of its approach.

1. It seems to us, however, that plaintiff's own testimony shows that he was guilty of contributory negligence as a matter of law. Plaintiff's testimony is that he took this position at 9:14½ a. m. The train that struck plaintiff was a regular train due at this point at 9:18 a. m. Plaintiff knew this. He also knew what time of day it was, to the fraction of a minute. With this knowledge he took this position in the path of the train and stood there looking in an opposite direction until the train came along and struck him. The train was in plain sight for 600 feet before it struck him. He was under no necessity of standing in the way of the train. There was a space of eight feet between the two tracks. It is not clear that plaintiff had any further duty in connection with the switching movement of his train except to wait until it passed and then "line the switch back." If it can be said that he was still under duty of watching for trains coming down the west bound main in the rear of his

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train, it appears that it was plain that there was no such train within 2,000 feet. Plaintiff was performing no duty so exacting but that he was free to look out for his own safety. His act in standing in the path of the train without any necessity of doing so, and with his back turned when he knew the train was due within a minute or two, at most, was, it seems to us, contributory negligence as a matter of law.

The case is quite different from such cases as Joyce v. Great Northern Ry. Co. 100 Minn. 225, 234, 110 N. W. 975, 8 L.R.A.(N.S.) 756; Floan v. Chicago, M. & St. P. Ry. Co. 101 Minn. 113, 111 N. W. 957; and Torkelson v. Minneapolis & St. L. R. Co. 117 Minn. 73, 134 N. W. 307, where plaintiff was absorbed in work upon or about the track on which the train approached, and it is different from Jordan v. Chicago, St. P. M. & O. Ry. Co. 58 Minn. 8, 59 N. W. 633, 49 Am. St. 486, where the exigencies of plaintiff's duties called upon him to go upon the tracks without premeditation or time or opportunity to ascertain whether there was danger.

2. Plaintiff contends that defendant was guilty of wanton negligence and that he may therefore recover regardless of contributory negligence on his part.

The rules of law on this subject in this state are now quite well settled. If a person is in a place of peril, no matter if he came there through his own negligence, another who discovers him in such place of peril is obliged to use ordinary care to avoid injuring him, and failure to exercise such care is said in law to constitute wanton or wilful negligence. Sloniker v. Great Northern Ry. Co. 76 Minn. 306, 79 N. W. 168; Rawitzer v. St. Paul City Ry. Co. 93 Minn. 84, 100 N. W. 664; Anderson v. Minneapolis, St. P. & S. Ste. M. Ry. Co. 103 Minn. 224, 114 N. W. 1123, 14 L.R.A.(N.S.) 886; Havel v. Minneapolis & St. Louis R. Co. 120 Minn. 195, 139 N. W. 137; Palon v. Great Northern Ry. Co. 129 Minn. 101, 151 N. W. 894.

The question is, was there any evidence of such wanton negligence in this case. We think there was not. Plaintiff was not on the track on which defendant's train was approaching. He was about two feet outside of the track and within a very few inches of clearing the train. It is true the engineer and fireman on defendant's train saw him there. But the significant fact is that plaintiff testified he thought he had taken

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a safe place to stand. The fireman too "thought he was in the clear." In view of the fact that plaintiff had the same notion, he cannot well complain of the fireman's misjudgment. Wanton negligence cannot be predicated on such a state of facts.

Order affirmed.

CHRIS ZOTALIS v. PETER CANNELLOS AND ANOTHER.[1]

October 26, 1917.

No. 20,467.

Waiver of condition in lease — subsequent breach.

1. By accepting rent after knowledge of a breach of the conditions of the lease, the lessor waives the right to re-enter for such breach, but does not waive the right to re-enter for a similar breach committed thereafter.

Same — subletting.

2. The lessor accepted rent with knowledge that a part of the building had been sublet; but the remainder of the building was sublet thereafter, and he is entitled to re-enter for this subsequent breach of the condition against subletting.

Subletting — re-entry.

3. Where the lease as originally prepared contained both a covenant against subletting and a condition authorizing the lessor to re-enter in case of a subletting, and the parties erased the covenant but left the condition, the condition remained in force.

Gambling on premises.

4. Shaking dice for cigars is gambling within the meaning of the provision in the lease which authorizes the lessor to terminate the same in case gambling is allowed upon the premises.

Action in the municipal court of Mankato for unlawful detainer of leased premises. The case was tried before Plymat, J., who made findings and dismissed the action. Plaintiff's motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

S. B. Wilson, Ivan Bowen and *Leroy Bowen,* for appellant.

C. E. Phillips and *C. J. Laurisch,* for respondents.

[1]Reported in 164 N. W. 807.

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TAYLOR, C.

In 1914, Swan A. Swanson leased a two story building in the city of Mankato to defendant Cannellos for a term of five years from October 1, 1914, for use as a pool-room and shoe shining parlor. In August, 1916, Swanson sold and conveyed the property together with all his rights under the lease to plaintiff. In November, 1916, plaintiff brought this action in the municipal court of the city of Mankato, under chapter 76 of the General Statutes of 1913, to recover possession of the premises for breach of conditions in the lease. The municipal court rendered judgment for defendants and plaintiff appealed therefrom.

Among other things the lease provides that: "If said leased premises shall be appropriated to or used for any other purpose or use than hereinbefore specified; or if any liquor, gambling or other immoral practices are allowed on said premises, or any damage or waste shall be made thereon; or if any part of said premises shall be underlet or this lease be assigned without the consent of said lessor on the back of this lease as above specified," then and in either of said cases the lessor or his agent is authorized to terminate the lease and to re-enter and take possession of the premises at any time after such breach without any previous notice of his intention so to do. Plaintiff contends that these conditions have been broken by using the second floor of the building as a rooming house and the basement as a tailor shop, by subletting the different floors of the building, and by permitting gambling therein.

After receiving his lease, Cannellos, with the knowledge and consent of Swanson, sublet the second floor of the building to a third party for use as a rooming house, and this floor has been used for that purpose by such third party ever since. Subsequently Cannellos sublet the basement for a tailor shop. Plaintiff purchased the property with knowledge of these facts, and thereafter accepted the rent for the building thereby recognizing the lease as still in force. The right to re-enter for these breaches of the conditions of the lease was waived.

On August 25, 1916, plaintiff notified Cannellos that he had purchased the building and to pay to him the rent accruing thereafter, and added to the notice: "I expect you to remain in possession and not to re-lease the building to any one else." On November 7, 1916, Cannellos leased the first floor of the building, being the part thereof used for a pool-room

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and shoe shining stand, to defendant Perrizo. On November 11, 1916, plaintiff began this action. After the subletting to Perrizo, plaintiff did nothing either by accepting rent or otherwise to waive that breach of the conditions of the lease. The fact that similar prior breaches had been waived did not operate to waive this breach. Gluck v. Elkan, 36 Minn. 80, 30 N. W. 446. And Cannellos had no reason to expect that it would be waived as he had been given notice not to "re-lease."

In the lease are several covenants on the part of the lessee, and following these are the various conditions, for breach of which the lessor is entitled to re-enter. The lease as originally prepared contained a covenant that the lessee would not sublet the premises or any part thereof nor assign the lease without the written consent of the lessor. This covenant was stricken out by a line drawn through it; but the provision authorizing the lessor to terminate the lease and take possession of the premises in case any part thereof should be sublet was not stricken out. Defendants contend that the fact that the parties struck out the covenant gives rise to the inference that they intended to eliminate all restrictions upon the right to sublet but inadvertently omitted to strike out the condition, and that the condition should be disregarded for that reason. This identical question was considered and decided adversely to defendants in Pond v. Holbrook, 32 Minn. 291, 20 N. W. 232. See also Bauer v. Knoble, 51 Minn. 358, 53 N. W. 805.

At a cigar stand on the first floor of the building any person who desired to do so has been permitted to shake dice with the attendant for cigars. If the attendant lost, the winner received a cigar for nothing; if the attendant won, the loser received one cigar but paid for two. Cannellos engaged in this practice as long as he operated the place, and Perrizo has engaged in it from the time he took possession until the time of the trial. Plaintiff insists that this constitutes gambling within the condition contained in the lease. Defendants insist that it does not, and further insist that if it does plaintiff has waived the breach by accepting rent with knowledge of the fact. By accepting the rent, plaintiff doubtless waived prior breaches of this condition, but this is a continuing condition and such acceptance did not waive subsequent breaches thereof. Gluck v. Elkan, 36 Minn. 80, 30 N. W. 446; Douglas v. Herms, 53 Minn. 204, 54 N. W. 1112; 16 R. C. L. p. 1136, § 657.

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The municipal court seems to have regarded shaking dice for cigars as too trivial to constitute gambling within the meaning of the condition. It has long been settled, however, that playing any game for cigars or drinks, or under an agreement that the loser should treat to cigars or drinks or other refreshments is gambling. State v. Wade, 43 Ark. 77, 51 Am. Rep. 560; State v. Maurer, 7 Iowa, 406; McDaniel v. Commonwealth, 6 Bush (69 Ky.) 326; Commonwealth v. Gourdier, 14 Gray, (Mass.) 390; Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; Brown v. State, 49 N. J. Law, 61, 7 Atl. 340; Hitchins v. People, 39 N. Y. 454; Walker v. State, 2 Swan (32 Tenn.) 287; Humphreys v. State, 34 Tex. Crim. 434, 30 S. W. 1066. Gambling with cards, dice or any other device whatever is prohibited by statute; and any person who suffers gambling devices to be used for the purpose of gambling in any building owned, occupied or controlled by him is guilty of a criminal offense. G. S. 1913, §§ 8732, 8733. The violation of a condition in the lease cannot be said to be trivial, when the violation is of such a character that the lessor may be subjected to a criminal prosecution on account thereof.

The findings of fact are perhaps sufficient to support the judgment; but the facts hereinbefore stated are undisputed and so far as the findings of fact are inconsistent therewith they cannot be sustained.

Judgment reversed.

STATE EX REL. RICHARD MARTIN v. CITY OF MINNEAPOLIS AND OTHERS.[1]

October 26, 1917.

No. 20,487.

Municipal corporation — discharge of street commissioner — certiorari will not lie.

Under Laws 1913, c. 105, p. 120, § 11, providing that the city council of Minneapolis shall have the power to discharge at will any subordinate employee, but that the discharge shall be forthwith reported in writing, together with the cause thereof, to the civil service commission, the act of the council in discharging a street commissioner is not a judicial or quasi-judicial act, and certiorari will not lie to review it.

[1]Reported in 164 N. W. 806.

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Upon the relation of Richard Martin, the district court for Hennepin county granted its writ of certiorari directed to the city of Minneapolis, the city council and others, to review the proceedings of the council in relation to relator's discharge from his office of street commissioner. Defendant's motion to quash the writ was granted, Steele, J. From the order discharging the writ, relator appealed. Affirmed.

Willoughby M. Babcock and *Walter Hennessey,* for appellant.

C. D. Gould, City Attorney, *William H. Morse* and *R. S. Wiggin,* Assistant City Attorneys, for respondents.

BUNN, J.

On January 6, 1913, Richard Martin was appointed street commissioner of the Twelfth ward of the city of Minneapolis by the common council of that city. Laws 1913, p. 116, c. 105, known as the "Civil Service Act", classified employees of the city of Minneapolis, and Martin's employment as street commissioner became governed by this act. February 23, 1917, the city council by resolution declared the office of street commissioner of the Twelfth ward vacant after the first day of March, 1917, and appointed one Rudsdil to fill the position temporarily until an examination for the selection of a successor might be held by the civil service commission. March 1, 1917, on the petition of Martin, as relator, a writ of certiorari was issued by the district court requiring respondents to certify and return to the court March 10, 1917, all the records and proceedings of the council relating to the matter of relator's discharge from the position of street commissioner. The respondents other than Rudsdil moved to quash the writ. The court granted the motion and relator appealed to this court.

The decision of the trial court was made on the ground that the action of the council in removing relator from the office of street commissioner was not a judicial or quasi-judicial act, and therefore was not subject to review on certiorari. If the court's premises are correct, there can be no doubt that its conclusion is. The sole question on this appeal is whether the action of the council in removing relator was a judicial or quasi-judicial act. If not it is elementary that certiorari will not lie.

Section 11 of the so-called Minneapolis Civil Service Law (Laws 1913, p. 120, c. 105), is the important one on this appeal. It is as follows:

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"The mayor, the city council, and each board, commission or appointing or employing officer of the city, shall have power to remove and discharge at will any subordinate employee, unless restricted by law other than this act, but such removal or discharge shall be forthwith reported in writing, together with the cause thereof, to the commission and the city comptroller. Such report shall be made when the reason is lack of work, as well as in other cases."

It is not claimed that the city council was "restricted by law other than this act" from discharging relator. The quoted section plainly says that the council had power to discharge relator at will. He was not entitled to a hearing, nor to be notified before the council should act of the cause of the proposed action. This is very clear, and is conceded. There is nothing of a judicial or quasi-judicial nature in this action of the council, unless the provision that "such removal or discharge shall be forthwith reported in writing, together with the cause thereof," etc., gives some judicial quality to the act of removal. We are unable to see anything judicial or quasi-judicial in the act of making the report, even if it be considered part of the action removing the employee. If the employee has any interest in the report, and he may have, his remedy is not certiorari but mandamus. The case of State v. McColl, 127 Minn. 155, 149 N. W. 11, is clearly distinguishable. The St. Paul charter provided that the comptroller should frame rules subject to the approval of the council, "which rules shall provide for discharge * * * only when the person * * * discharged * * * has been presented with the reasons for such discharge, specifically stated in writing, and has been allowed a reasonable time to reply thereto in writing." It was held that this provision contemplated that removals should be made only for some cause touching the fitness and qualifications of the officer to discharge the duties of his office, to be determined by the removing officer and therefore that his determination is quasi-judicial and may be reviewed on certiorari. In the present case the law does not require that the employee shall be presented with the reasons for his discharge, or allowed time to reply thereto, or that the removal shall only be for some cause touching the fitness of the employee. The other cases cited by relator are no more in point. They, like the McColl case, are all cases where the removing officer could not remove at will, but was obliged to decide the quasi-judi-

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cial question whether cause for removal existed. Here the council may remove its employee at will. There is no notice, no hearing, and no judicial determination that a cause for removal exists. The cases are all cited in the McColl case, and we need not cite them here. The case of O'Dowd v. City of Boston, 149 Mass. 443, 21 N. E. 949, is most like the present case. The reason for requiring the discharge and the cause thereof to be reported to the commission and the comptroller is found in the provisions of the act requiring records of all employees to be kept.

We agree with the trial court that the act of the council in removing relator was not a judicial or quasi-judicial act, and is therefore not subject to review on certiorari.

Order affirmed.

STATE EX REL. E. G. MINDER v. E. V. O'BRIEN.[1]

October 26, 1917.

No. 20,496.

Judicial ditch — appointment of referee invalid.

An order made by the judge of the district court, appointing a referee on all judicial ditches then pending or that might thereafter be instituted in such judicial district, is unauthorized by section 5571, G. S. 1913.

Upon the relation of E. G. Minder the district court of Murray county granted an alternative writ of mandamus commanding E. V. O'Brien, as auditor of that county, to issue to relator a county warrant on the treasurer for $711.90. On the return day the county attorney appeared specially and moved to dismiss the proceedings for want of jurisdiction. The matter was heard before Nelson, J., who made findings and ordered a peremptory writ to issue. From the judgment entered pursuant to the order for judgment, E. V. O'Brien, as County Auditor, appealed. Reversed.

Ole Swanjord, County Attorney, and *Murphy & Anderson,* for appellant.

Seager & Seager, for respondent.

[1]Reported in 164 N. W. 817.

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PER CURIAM.

Appeal from a judgment of the district court of Murray county, adjudging that a peremptory writ of mandamus issue to appellant, E. V. O'Brien, as auditor of that county, commanding him to issue a county warrant for the sum of $711.90.

On February 2, 1916, the judge of the district court of the Thirteenth judicial district, comprised of five counties, by order, appointed relator as referee on all judicial ditches then pending or that might thereafter be instituted in that district. Under that appointment relator, between March 2 and June 28, performed services and incurred expenses in connection with the preliminary work on Judicial Ditch No. 4, then pending in Murray county, to the amount of $711.90.

On August 31, 1916, at the final hearing thereon, that ditch proceeding was dismissed by order of the court, upon the ground that the petitioners therefor refused to file a further bond as required by the court. On September 15, 1916, relator presented a verified statement of his claim to the judge of the district court for audit and allowance. The judge allowed the claim without any notice of hearing thereon being given to the county, and by order directed the auditor to issue a county warrant for the payment thereof. Relator presented the account so allowed to the auditor and demanded a county warrant. The auditor refused to issue the warrant. This action followed and finally judgment was entered directing a peremptory writ of mandamus to issue, requiring appellant, the county auditor, to issue the county warrant asked for. From that judgment this appeal was taken.

The order appointing relator as referee on all ditches in the district, is a mere nullity, being clearly unauthorized by the statute. The allowance of relator's claim is governed wholly by the decision of this court in State v. District Court, infra, page 204, 164 N. W. 815, holding the provision of section 5571 of the statutes invalid insofar as it provides for the allowing of claims against a county without notice of hearing thereon, as not being due process of law.

Judgment reversed.

HALLAM, J.

I concur in the result. I agree that the order appointing relator as

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referee was unauthorized. My views as to the validity and application of section 5571, G. S. 1913, are stated in State v. District Court, infra, page 204, 164 N. W. 815.

MARY SCHAUBLE v. S. A. HEDDING AND OTHERS.[1]

October 26, 1917.

No. 20,502.

Principal and agent — estoppel against principal — exchange of property.

A principal is bound by the acts of his agent within the apparent or ostensible authority with which he has clothed him, when the one dealing with him and invoking an estoppel relies in good faith upon the appearance of authority and by it is induced to act. This doctrine is applied to a case where the plaintiff confided to her agent all the negotiations for the exchange of property with the defendant, intrusted him with a deed executed by her with the name of the grantee blank, and instructed him not to deliver until she was satisfied with the title, and he, disregarding his instructions, filled the blank and made delivery and received the defendant's deeds in return, and the defendant in making the exchange acted in good faith in reliance upon the apparent authority of the agent; and upon evidence either proving or fairly tending to establish such facts there was an issue for the jury upon the ultimate question whether the plaintiff because of apparent and ostensible authority in her agent relied upon by the defendant was precluded from repudiating the transaction.

Action in ejectment in the district court for Hennepin county and for $1,000 for use and occupation of the premises. The case was tried before Giddings, J., who when plaintiff rested denied defendants' motion to dismiss the action and at the close of the testimony motions of the respective parties for a directed verdict, and a jury which returned a verdict for $492.61. From an order granting defendants' motion for a new trial, plaintiff appealed. Affirmed.

W. G. Compton and *Frank McNulty,* for appellant.

William B. McIntyre, for respondents.

[1]Reported in 164 N. W. 808.

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DIBELL, C.

This is an action of ejectment brought by the plaintiff against the defendants S. A. Hedding, Mae O. Hedding and John Buschers to recover possession and for the use and occupation of a lot in Minneapolis. There was a verdict for the plaintiff against all of the defendants for possession and for money damages. Upon motion of the defendants the court granted a new trial upon the ground that it was in error in not submitting a certain issue to the jury. The plaintiff appeals from the order granting a new trial.

The important facts either undisputed or as they might be found from the evidence viewed favorably to the defendants are within brief compass. The plaintiff owned the lot which is the subject matter of this action and had negotiations with the defendant Mae O. Hedding relative to an exchange of it for Lake Minnetonka property. One Hatton was her agent. The plaintiff examined the property. She was not pleased with it and declined to make the exchange. She then suggested that the defendant propose other property in exchange. After this she did not see the defendant or any one representing her. Whatever negotiations she afterwards had with the defendant were exclusively through Hatton. The defendant proposed an exchange of North Dakota lands. Hatton inspected a part of them at the plaintiff's request and reported to her. On April 8, 1914, the plaintiff executed a deed of her Minneapolis lot, leaving the grantee blank and intrusted it to Hatton. She instructed him, so her testimony is and it is not disputed, to keep it in his possession until she was satisfied with the title of the North Dakota land that she was to get in exchange. Hatton went to Minneapolis, inserted the name of Mrs. Hedding as grantee, closed the deal with her, and took and recorded deeds to the North Dakota lands. The defendant knew that the deed was in blank and that Hatton inserted her name. Hatton was the only one with whom she dealt in making the exchange. The plaintiff did not see the defendant's deeds until after their record. She was dissatisfied, sought to have the transaction rescinded, and failing some time later brought this action to recover the Minneapolis lot. Mrs. Hedding in the meantime had taken possession through a tenant. The defendant did not know that the agent exceeded his authority and relied upon that appearing in him.

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Stating the controlling facts still more briefly they are these: The plaintiff confided to her agent all the negotiations for an exchange of lands with the defendant and intrusted him with a deed, executed by her in blank as to the grantee, with instructions to retain possession until she was satisfied with the title to the property which she was getting in exchange; and her agent, disregarding her instructions, filled in the name of the defendant as grantee with the knowledge of the defendant, delivered the deed, and took in exchange and recorded the deeds of the defendant who, in completing the transaction, acted in good faith and relied upon the appearance of authority in the agent with whom alone she dealt.

In substance the court instructed the jury that Mrs. Hedding got nothing by the delivery to her of Mrs. Schauble's deed and that the plaintiff was entitled to a verdict unless after knowledge of the transaction she ratified the act of her agent Hatton in delivering the deed. The theory of the court was that her agent was without actual authority to make a delivery, that it was for the defendant to ascertain his authority, and that he being without authority the deed was not effective unless because of subsequent ratification. The jury returned a verdict for the plaintiff and in doing so necessarily found against a ratification. The court, conceiving that it was in error in submitting the single issue of ratification, and that it should have submitted the question whether Mrs. Schauble clothed her agent with ostensible or apparent authority to fill the blank and make delivery and was bound by his act in favor of one relying upon his apparent authority, granted a new trial. And the question on this appeal is whether upon evidence sufficient to show facts such as these recited there might be a finding that the plaintiff was estopped against the defendant relying upon the apparent or ostensible authority of the agent with whom she negotiated.

The rule is general that the principal is bound by the acts of his agent within the apparent or ostensible authority with which he has clothed him when the party dealing with him and invoking an estoppel has acted in good faith in reliance upon the appearance of authority. 1 Dunnell, Minn. Dig. § 156; 1 Mechem, Agency (2nd ed.), §§ 720-726; 1 Clark & Skyles, Agency, §§ 208-209; Reinhard, Agency, § 192; 16 Dec. Dig. Principal and Agent, § 99; 40 Cent. Dig. Id. §§ 254-261. Some authorities

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suggest that when apparent authority exists liability arises without the aid of an estoppel. See discussion and cases cited in 16 Harvard Law Rev. 186; 5 Columbia Law Rev. 36, 261, 354, 456; 6 Col. Law Rev. 34. Sometimes the controversy is over phraseology or because of a confusion in the use of terms. Our court has always distinguished between apparent and ostensible authority and implied authority, the latter alone constituting authority in fact, and conveniently enough has rested liability substantially upon estoppel. Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078; Johnson v. Evans, 134 Minn. 43, 158 N. W. 823; Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 N. W. 236, 50 L.R.A.(N.S.) 74; Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061. The distinction though often useful is not always observed. Frequently there is confusion. The evidence that tends to show implied authority may show apparent authority. We need not pursue the discussion, for it is conceded that there was not actual authority and that only apparent or ostensible is shown.

Cases illustrating the principle of liability are without number. Those we cite illustrate it generally and a few of them are of value upon the particular facts before us. Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061; Brown v. Ames, 59 Minn. 476, 61 N. W. 448; Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 N. W. 236, 50 L.R.A.(N.S.) 74; Pence v. Arbuckle, 22 Minn. 417; Dobbin v. Cordiner, 41 Minn. 165, 42 N. W. 870, 4 L.R.A. 333, 16 Am. St. 683; Nelson v. McDonald, 80 Wis. 605, 50 N. W. 893, 27 Am. St. 71; Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486; Morris v. Joyce, 63 N. J. Eq. 549, 53 Atl. 139; Putnam v. Clark, 29 N. J. Eq. 412; Reed v. Morton, 24 Neb. 760, 40 N. W. 282, 1 L.R.A. 736, 8 Am. St. 247; Guthrie v. Field, 85 Kan. 58, 116 Pac. 217, 37 L.R.A.(N.S.) 326.

We are not embarrassed by a rule which prevents the parol authorization of the filling of a blank in a sealed instrument. A seal is not essential to a deed. G. S. 1913, § 5704. The rule in this state is and it was before seals were abolished that the authority to fill a blank in a sealed instrument may be by parol, and that it may be implied, and that when filled with authority the deed is effective. Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095, 41 L.R.A.(N.S.) 637; Casserly

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v. Morrow, 101 Minn. 16, 111 N. W. 654; State v. Young, 23 Minn. 551. Elsewhere the rule is not uniform. 1 Devlin, Deeds, § 457; 1 Mechem, Agency, §§ 213-215; 1 Clark & Skyles, Agency, §§ 53-60; Reinhard, Agency, § 61; 2 Jones, Real Property in Conveyancing, §§ 1328-1331.

If the filling of a blank by actual authority of the grantor makes the deed effective as a conveyance, no substantial reason exists why the result should be different when it is filled by one acting under an apparent or ostensible authority upon which the grantee in good faith relies under circumstances otherwise creating an estoppel. If there had been actual authority to fill the blank the deed would have been effective though the defendant had been present when her name was inserted and knew of it. Indeed if properly authorized she might herself have filled the blank. Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095, 41 L.R.A.(N.S.) 637. When the blank is filled pursuant to actual authority, the deed is effective and it is unnecessary to invoke an estoppel. Where there is an absence of actual authority, but a reliance upon apparent or ostensible authority, as here, the estoppel makes the deed effectual. The result may be different in a jurisdiction where the exercise of parol authority to fill a blank is ineffectual to pass title except by the aid of an estoppel and where knowledge that the deed was in blank would prevent an estoppel.

The evidence was such that the issue of apparent or ostensible authority upon which the defendant relied should have been submitted to the jury and the court was not in error in granting a new trial. The order is sustained upon the one ground discussed. We do not consider whether there was such acquiescence in the transaction for so long a time after knowledge of it that the plaintiff should be required to abide by it. That question may be met on the new trial. In view of a new trial, however, it is proper to say that the defendant Buschers was in no way connected with the possession and the defendant S. A. Hedding was not connected with the possession and was interested only as husband of the owner; and the verdict against them was wrong for reasons other than those discussed in this opinion.

Order affirmed.

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MARY E. STERLING v. GEORGE B. MILLER.[1]

October 26, 1917.

No. 20,504.

Appointment of guardian for incompetent — finding sustained by evidence.

In proceedings for the appointment of a guardian for the estate of an alleged incompetent, it is *held* that the evidence sustains the finding of the trial court that the person of whose estate the guardian was asked was not unable or incompetent to have the care and management of his property.

Mary E. Sterling petitioned the probate court for Yellow Medicine county for the appointment of Charles L. Hardy as guardian of the estate of her father, George B. Miller, who was alleged to be incompetent by reason of old age and loss of his mental faculties. From an order appointing Hardy as guardian, George B. Miller appealed to the district court for that county. The appeal was tried before Daly, J., who made findings and reversed the order of the probate court. From an order denying her motion for a new trial, Mary E. Sterling appealed. Affirmed.

John A. Dalzell and *L. D. Barnard,* for appellant.

Davis & Michel and *Bert O. Loe,* for respondent.

BUNN, J.

On the petition of appellant the probate court of Yellow Medicine county, after a hearing, appointed a guardian of the estate of George B. Miller, the father of petitioner, finding that he was unable and incompetent to care for and manage his property. Miller appealed to the district court, where the matter was tried de novo. The district court reversed the order of the probate court, finding that Miller was not unable or incompetent to have the care and management of his property. Petitioner appeals to this court from an order denying a new trial.

The only question is whether the finding referred to is sustained by the evidence. We hold that it is. Appellant's claim that the rule that the

[1] Reported in 164 N. W. 812.

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findings of the trial court will not be set aside by this court unless manifestly and palpably against the weight of the evidence does not apply here because the probate judge decided the other way is wholly untenable. It would be profitless to discuss the evidence. We have considered it carefully, with the result stated. The trial court was in a much better position than we are to judge of the capacity of the alleged incompetent. We cannot disturb its decision on the record before us.

Affirmed.

ANNA SCHMITT v. CITY OF MINNEAPOLIS AND ANOTHER.[1]

October 26, 1917.

No. 20,521.

Railway bridge — verdict sustained by evidence.

1. The evidence is *held* sufficient to support the finding of the jury that the plaintiff sustained an injury while on the portion of a street bridge over the tracks of the defendant railway which it was under obligation to keep in condition for travel.

Same — evidence of condition after accident.

2. It was not error to receive the testimony of a witness who examined the bridge two weeks after the accident and found a defect in the bridge corresponding to that claimed by the plaintiff, the purpose being to locate the place where the accident occurred.

Damages not excessive.

3. The verdict was not excessive.

Action in the district court for Hennepin county to recover $12,500 for injuries sustained while crossing a bridge over the tracks of defendant railroad company. The case was tried before Hale, J., who when plaintiff rested denied motions for a directed verdict in favor of each defendant, and a jury which returned a verdict for $2,500. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant company appealed. Affirmed.

F. M. Miner and *M. M. Joyce,* for appellants.

Frank W. Booth, for respondent.

[1]Reported in 164 N. W. 801.

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DIBELL, C.

This is an action to recover for personal injuries brought by Anna Schmitt against the city of Minneapolis and the Minneapolis & St. Louis Railroad Company. There was a verdict for the plaintiff against both defendants. The railway company appeals from the order denying its alternative motion for judgment or a new trial.

1. The injury to the plaintiff occurred while she was crossing the Fifth street bridge in Minneapolis over the tracks of the Great Northern Railway and the defendant railway. Her foot caught in a hole over which a thin slab or board had been nailed and she was thrown down and injured. The defendant contends that the injury did not occur on the portion of the bridge over its tracks which alone it was under obligation to keep in condition for travel. This is the important question in the case. The defendant offered no evidence on this point. That of the plaintiff is indefinite and not wholly satisfactory. There is some contradiction in it. From an examination of it we reach the conclusion that the jury could reasonably find that the accident occurred on the defendant's portion of the bridge.

2. A witness who examined the bridge two weeks after the accident was permitted to testify that there was then a hole in the part of the bridge belonging to the defendant. It is claimed that this was error. We think that it was not. The hole which he described had been covered by a thin board which was nailed over it and it had broken through. It answered the description of the one which resulted in the plaintiff's injury. The witness located it on the defendant's portion of the bridge substantially at the point fixed by some of the testimony of the plaintiff. It was the only hole in the vicinity. The testimony had some tendency to locate the place of the accident on the defendant's portion of the bridge and it was not error to receive it.

3. The verdict was for $2,500 and the defendant claims it to be excessive.

The principal injury was to the plaintiff's left ankle. There was a slight injury to the head but its effects have passed. According to the testimony of her physician the articular surface of the ankle bone was fractured and thrown or shoved back and out of place. He gave it as his opinion that the joint will never perform normal service. She suf-

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fered considerable pain. There is evidence that some of her trouble is ascribable to fallen arches and not all of it to the accident. The award is a liberal one but under the rule for our guidance in reviewing verdicts we cannot say that it is excessive.

We have mentioned all points raised by the assignments and discussed in the briefs. We find no error.

Order affirmed.

LARS M. PETERSON v. WILLIAM A. MARTIN.[1]

October 26, 1917.

No. 20,527.

Explosive — liability of lessor for injury to child of lessee.

1. Leaving a small box of dynamite caps in a granary on a plate which is 9 feet and 10 inches from the floor, is not of itself such negligence as will render the lessor liable for injury to the lessee's child, who is injured while playing with the caps.

Same — proximate cause of injury — question for jury.

2. Where, subsequent to the original negligent act, a new and independent cause has intervened, of itself sufficient to stand as the cause of the injury, such facts will be considered the proximate cause of the injury, and the original negligence too remote; but where there is a conflict in the testimony as to the facts constituting the intervening cause, the question is for the jury.

Same — negligence of parent imputed to child.

3. Acquiesence by a parent in the use by his child of explosives which he has found where they had been negligently left by a stranger, destroy's the latter's responsibility for injury to the child, caused by the explosives.

Action in the district court for Murray county by the father and natural guardian of Lyman Peterson, a minor, to recover $15,200 for injuries sustained by the minor through the explosion of dynamite caps stored in defendant's granary. The answer alleged that the explosives were under the exclusive control of plaintiff, he had them to use about certain work to be done by him, and that he was careless in allowing his

[1]Reported in 164 N. W. 813.

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child to get possession of them, who knowing they were dangerous caused them to explode. The case was tried before Nelson, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for $10,000. Defendant's motion for a new trial was granted unless plaintiff consented to a reduction of the verdict to $5,000. From the judgment entered pursuant to the reduced verdict, defendant appealed. Reversed and new trial granted.

Paul J. Thompson, M. A. Hessian and *M. J. Harrington,* for appellant.

O. J. Finstad, for respondent.

QUINN, J.

Action by Lars M. Peterson for injury to his minor child, resulting from the explosion of a dynamite cap. Plaintiff had a verdict of $10,000 for the benefit of the child. Upon motion the trial court granted a new trial, unless plaintiff remit the sum of $5,000 therefrom, in which event a new trial was denied. Plaintiff filed his consent to the reduction and defendant appealed.

The defendant owned a farm of 80 acres in Murray county. Prior to March 1, 1916, in clearing the same, he used dynamite caps to blast stumps. He had a few caps left in a small box, which he placed and left upon the plate over the north wall in the granary on the premises. This plate was 9 feet and 10 inches from the floor. The studdings were 16 inches apart. There was a board partition 3 feet and 10 inches high extending north and south across the granary, the north end of which was nailed to the west side of the studding immediately east of where the caps were. It was 6 feet from the top of this partition to the top of the plate. Two feet below the plate was a girder or brace on the studding. East of the partition, between the two studdings next to it and 4 feet and 5 inches below the plate, was a cross piece which is referred to as Number 5. Upon the trial plaintiff testified that, aside from the above, there was a cross piece on the studding about 2 feet above the partition, and immediately above this cross piece was a short board nailed onto the side of the studding, extending out about 8 inches, used for hanging articles on.

The plaintiff contends that, on March 1, 1916, when he moved upon the premises with his family, under a lease from the defendant, and took

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possession of the granary, it was in the condition above stated. Plaintiff concedes that shortly thereafter he fastened his tool chest upon the north wall of the granary over the cross piece referred to as Number 5, from the top of which the boy might reach the caps, and that during the month of April or May following the defendant told him about the caps being on the plate, and that he saw them there and that he remained in possession of the granary until after the accident. The plaintiff testified that his family consisted of his wife and two children, Lyman, seven years of age, and a younger brother; that Lyman was in good health, very active, a good climber and a great fellow to examine everything he could get hold of, and that he played about the premises and often went into the granary. It appears that the boy went into the granary two or three days before the accident, climbed up and took some of the caps from the box and put them in his pocket; that he afterward showed one of them to his mother, and that the mother examined it and apparently not knowing the character of the cap handed it back to the boy. But she testified that she told the plaintiff that the boy had it. The witness Leibfried was plaintiff's hired man, and he testified that at noon on August 2, the day of the accident, while he was watering his horse, the boy was near the well; that he had one of the caps blowing into it; that witness asked the boy to give him the cap or he might blow his head off, and that the boy replied that his mother had blown into it and had given it back to him, and that he could do as he pleased with it; that witness then attempted to take the cap from the boy, but he ran away; that the father of the boy stood within 12 feet of witness during this talk and, it seemed, ought to have heard what was said. It further appears that, during the afternoon of that day, the boy went to the hired man's room, secretly took three matches and went to the barn. While holding one of the caps in his left hand, he lit and applied one of the matches to it, thereby causing it to explode, tearing his thumb and three fingers from his left hand and destroying the sight of his right eye.

The defendant contended upon the trial, and there was testimony offered to the effect, that there were no cross pieces upon the studding above the partition at the time he turned the premises over to plaintiff, and that if there were any such at the time the boy procured the caps, they must have been placed there after the plaintiff went into possession

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of the granary. He also claimed that he turned the dynamite and caps over to plaintiff for blasting operations, and expressly informed him of the presence and location of the same in the granary.

It may be said that the placing of a box of such caps upon a plate 9 feet and 10 inches above the floor in a granary would not in itself constitute a negligent act; but if, at the time of so placing the caps, there were steps or other means by which a boy of immature years might reach them, quite a different question might arise. If, as claimed, defendant turned the dynamite and caps over to plaintiff for use in blasting operations, or if plaintiff was expressly informed of the presence and the location of the same in the granary, and he thereafter placed cleats upon the wall of the granary, thereby making the caps readily accessible to the boy, such act on his part would, in our opinion, constitute an independent, intervening cause which might well be considered the proximate cause of the injury, even though defendant were negligent in the first instance. Finkbeiner v. Solomon, 225 Pa. St. 333, 74 Atl. 170, 24 L.R.A.(N.S.) 1257; Pollard v. Oklahoma City R. Co. 36 Okla. 96, 128 Pac. 300, Ann. Cas. 1915A, 140. We are of the opinion that this phase of the case, and the testimony bearing thereon, should have been submitted to the jury under proper instructions. The court, however, said to the jury at the conclusion of the charge: "There was one question I intended to have called your attention to and that is the claim that the defendant had turned this dynamite and dynamite caps over to Lyman Peterson's father: I charge you upon that point that there is no evidence here that Lars Peterson, the nominal plaintiff here, accepted that, so that you are not to consider that as a defense at all." This was error for which a new trial must be granted.

In the event of a new trial, it may be said that it is a well settled rule that if, subsequent to the original negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote. In this case the mother testified that Lyman brought a cap and showed it to her; that she examined it and gave it back to him; that she did not know what it was, but thought it was some kind of an empty shell, and that she afterward told the plaintiff about the boy's having the same. This testimony, taken in connection with the testimony of the hired man about his conversation with the boy at the well

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and about the father's standing within possible hearing thereof, made a question for the jury as to whether the father knew of the boy's having the cap in his possession. If, as a matter of fact, the father knew of the explosive character of the caps and that the boy had them in his possession, it was the father's bounden duty to take them from the child, and, failing so to do, the father's course of conduct would break the connection between the original negligent act of the appellant and the injury to the boy. It would establish a new and independent cause, and the possession of the cap by the child would thereafter be attributable to the permission of his father and wholly independent of the original negligence charged to appellant. Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 113 S. W. 647, 18 L.R.A.(N.S.) 905, and cases cited.

Reversed and a new trial granted.

CHARLES MOONEY v. FARMERS MERCANTILE & ELEVATOR COMPANY OF MADISON AND OTHERS.[1]

October 26, 1917.

No. 20,533.

Corporation — distribution of profits by co-operative association.

1. A co-operative association organized under section 6485, G. S. 1913, is authorized by the statute to provide by by-law for the distribution of profits and earnings in such proportion as the stockholders may deem just.

Same — by-law.

2. A by-law which discriminates within reasonable limits between stockholders who deal with the company, thereby increasing its earning power, and those who do not deal with it, *held* not violative of the rights of the stockholders thus discriminated against.

Same — division of profits — change permissible.

3. For several years the company made an equal pro rata distribution of its profits without discrimination; it is *held*, that the custom in this respect, though extending over several years, did not preclude the company from departing therefrom, or deprive it of the right to enact a by-law providing for a different distribution. No right of the nonassenting stockholders was thereby violated.

[1]Reported in 164 N. W. 804.

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Action in the district court for Lac qui Parle county to restrain defendant corporation from distributing its net earnings except to its stockholders. The case was tried before Qvale, J., who made findings and dismissed the action. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

T. J. McElligott, for appellant.

A. W. Ewing, for respondents.

BROWN, C. J.

Defendant, Farmers Mercantile & Elevator Company, is a corporation, organized in June, 1899, under the provisions of section 2903, et seq., G. S. 1894, as a co-operative association, and the persons named as defendants are its officers and have in charge the management and control of the corporate affairs. The business of the company is and at all times has been the buying, selling, receiving, forwarding and handling of wheat, oats, barley, and other farm products, and also buying and selling coal and other fuel, all at Madison, this state, its place of business. The stock of the company was fixed at $25 per share, but no person was permitted to hold or own more than two shares. The statutes under which it was so incorporated make provision for the distribution of the profits or earnings of the company among its "workmen, purchasers, members and stockholders as shall be prescribed by the by-laws." Section 2912, G. S. 1894 (section 6485, G. S. 1913). No profits were realized prior to 1904, but thereafter they were sufficient for a distribution of from five to ten dollars per share each year, and were divided pro rata among the stockholders without discrimination. But such distribution was not controlled or fixed by any by-law of the company, for no by-law on the subject was enacted until October 17, 1914. At that time the method of profit distribution was changed by the adoption of the following by-law, namely:

"The net profits of the business of this corporation shall be applied and divided among its shareholders at the end of each business year as follows: A dividend of not to exceed seven (7) per cent per annum shall be paid upon the outstanding stock on the date of such division. The remaining balance shall be divided among the shareholders of this corporation pro rata to the amount of business each has furnished to the

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company during the year, in the form of furnishing to it the product or products in which it is dealing."

Profits were realized during the years following and pursuant to the provisions of this by-law 7 per cent thereof was distributed to the stockholders without discrimination, and the remainder was paid over to such stockholders as had dealt with the company, and thereby contributed to its earning power by the sale and delivery to it of their farm products, and the purchase of the commodities held by it for sale to the trade, and in the proportion of the business each so contributed to the company.

Plaintiff is a farmer and a stockholder and one of the organizers of the company, owning one share of stock, but did not contribute to the business of the company by a sale of his farm products to it, or otherwise, and after the adoption of the by-law shared only in the 7 per cent distribution. By this action plaintiff challenges the validity of the by-law, and insists upon the right to an equal pro rata distribution of all earnings of the company. The trial court found the facts as here stated, held that the by-law was valid, the distribution of the earnings of the company in harmony therewith not a violation of any of the rights of plaintiff, and judgment was ordered accordingly. Judgment was so entered and plaintiff appealed.

The only question presented is whether the method of distributing the earnings of the company as fixed by the by-law violates any of the vested legal or equitable rights of plaintiff. We answer the question in the negative. A co-operative association such as the legislature had in mind in the enactment of the statute under which defendant was incorporated, has been defined to be a "union of individuals, commonly laborers or small capitalists, formed * * * for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each." Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L.R.A. 778, 38 Am. St. 552. They are local in character, their activities are confined to limited territory within which the members reside, and the ownership of stock therein is expressly limited by the statute. Section 6488, G. S. 1913. The scheme of the corporation is the reciprocal co-operation by the members of the company for their mutual benefit, and in this respect is differentiated from corporations organized for general commercial purposes, or those wherein

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the pecuniary profits furnish the principal object of the enterprise. The distribution of profits is subject to regulation by the by-laws of the company, and the rights of all shareholders are controlled thereby. The language of the statute is that the "profits or earnings of such association shall be distributed to those entitled thereto by its by-laws, and in proportions and at the times therein prescribed." Such general authority as to profit distributions is not possessed by corporations formed for ordinary commercial purposes. 2 Cook, Corp. (7th ed.) § 540.

It was clearly competent for the legislature to commit the subject to the judgment and discretion of the stockholders. And a by-law enacted in pursuance of such authority, which is not unfair or unreasonable, cannot well be challenged as violating the rights of nonassenting stockholders. This by-law was enacted at an adjourned annual meeting, at a time when it was proper to do so. Plaintiff was present at the annual meeting, and it is not important that he was not subsequently notified of the date to which the meeting adjourned. The by-laws do not require such notice. Morrill v. Little Falls Mnfg. Co. 53 Minn. 371, 55 N. W. 547, 21 L.R.A. 174; Clark v. Wild, 85 Vt. 212, 81 Atl. 536, Ann. Cas. 1914C, 661. The distribution thus provided for is not unreasonable or unfair, but rather in accord with the fundamental purpose of the company, namely, reciprocal efforts and benefits, and sends in part the earnings and profits to those of the stockholders who by their patronage make a realization thereof possible, and in proportion as they thus contribute to the prosperity of the company. Of this no stockholder can well complain.

But plaintiff does not challenge the validity of the by-law for lack of authority to enact it in the first instance. His precise claim is that, since the company established the practice and custom of distributing the entire surplus earnings to all shareholders alike and in proportion to the stock held by each, such practice and custom became in legal effect a by-law, vesting in each stockholder an inviolable right to a continuation thereof during the life of the corporation. We do not sustain this claim. It is not nor could it well be argued that any contract right of plaintiff was violated by the by-law. The matter of profit distribution is by the statute committed to the corporation without restriction or limitation. When plaintiff became the owner of his stock no by-laws upon the subject had been enacted, and the issuance of the stock to him was necessarily

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subject to an exercise of the statutory authority thus granted whenever in the judgment of the company it became necessary or proper. And though the issuance of the stock vested in plaintiff the contract right to dividends whenever declared, the proportion and extent thereof was held in reserve by force of the statute conferring the right of regulation upon the company. In this situation no contract right of plaintiff has been in any way violated. And if it be conceded, in harmony with his contention, that the long continued practice and custom of distributing the profits of the company in equal proportions to all stockholders became in legal effect a by-law, it is clear that the corporation could, without infringement of stockholders' rights, abandon the custom or modify it to any extent deemed fair and reasonable, precisely as a formally enacted by-law upon that or upon any other subject could be amended or wholly repealed. The power of amendment when no vested rights are impaired is clear. 7 R. C. L. 143. And with such power conceded, as it must be, the only inquiry is whether by reason of some right arising from the custom plaintiff is in position to insist that it be continued during the life of the corporation. We discover no such right. With no contractual obligation violated, the only theory upon which plaintiff might hope to prevail would be under the doctrine of equitable estoppel. But he has no standing there. He was an original stockholder, and did not become such in reliance upon the custom of profit distribution to all stockholders alike, for such custom was not followed until long after the issuance of his stock. And aside from that fact, he is in no position to invoke the doctrine, for it has application only to prevent fraud and injustice. No fraud is claimed, and, for reasons already stated, there is no injustice in the profit sharing regulations here made. The reciprocal characteristics of the corporation fully justify such discrimination.

Judgment affirmed.

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STATE EX REL. COUNTY OF MURRAY AND OTHERS v. DISTRICT COURT OF THIRTEENTH JUDICIAL DISTRICT AND OTHERS.[1]

October 26, 1917.

No. 20,582.

Judicial ditch — payment of engineer — due process of law — statute invalid.

The legislature intended, by the provisions of G. S. 1913, § 5571, and the judicial ditch law as a whole, to make the county or counties in which a judicial ditch is proposed to be constructed primarily liable for the compensation and expenses of the engineer appointed by the court and of others who perform services in the proceeding, whether the ditch is established or the proceedings dismissed. Assuming without deciding that this would violate no constitutional provision, if the law provided for notice to the county, and a right and opportunity to be heard on the application to the court to allow, audit and order paid such compensation and expenses, if it does not so provide there is not due process of law. The provision in section 5571 that in case of a judicial ditch all "fees, per diem compensation and expenses * * * shall be audited, allowed and paid upon the order of the judge of the district court having charge thereof" provides for no notice to the county, no right or opportunity to be heard, nor does any other provision of the law. This provision is unconstitutional as not due process of law, and an order made thereunder is void.

Upon the relation of the county of Murray, E. V. O'Brien and E. V. O'Brien, as county auditor of that county, the supreme court granted its writ of certiorari directed to the district court of the Thirteenth judicial district for that county, the judge and clerk thereof, and C. W. Gove, to review the proceedings in that court for the establishment of Judicial Ditch No. 4, Nelson, J., and to stay the issue of a county warrant for the payment of the account of said Gove. Reversed.

Ole Swanjord, County Attorney, *Murphy & Anderson* and *Thomas Kneeland,* for relator.

E. H. Nicholas, for respondents.

[1]Reported in 164 N. W. 815.

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BUNN, J.

This case is before the court on a writ of certiorari issued to review an order of the district court auditing and allowing at the sum of $6,160-.08 the account and claim of the engineer appointed in judicial ditch proceedings. The order under review was made ex parte and directs that the claim so audited and allowed be paid by the county of Murray, "as in such case provided by law." The ditch proceedings were instituted by the petitioners in May, 1914. They gave a bond in the sum of $1,000, conditioned, as required by statute, to pay all expenses in case the court should fail to establish the ditch. There was a first hearing on the petition, and the court appointed C. W. Gove as engineer to make a survey and report. Gove accepted the appointment, and entered upon the performance of his duties thereunder. He made a complete survey, and in July, 1915, made a full report of such survey to the court. Viewers were appointed, qualified, did their work and filed their report. There was a hearing on these reports, and the court in June, 1916, resubmitted the matter to the engineer and viewers with certain directions and suggestions. At the same time the court ordered the petitioners to file an additional bond in the sum of $750, and instructed the engineer and viewers not to proceed until such bond was filed, notifying the petitioners that if the bond was not filed the proceedings would be dismissed. The bond was not filed, and on August 31, 1916, on motion of certain of the objectors, the court dismissed the proceedings. The account and claim of the engineer was presented some eight months later, and was audited and allowed May 1, 1917. As already stated this order was made on ex parte application, neither the county of Murray nor the petitioners having notice thereof.

Relators attack the order under review on several grounds. They assail the regularity of the proceedings, including those leading up to the order appointing the engineer, and subsequent proceedings, and question the account on the merits; but the important contention is that the statute under which this claim was approved and ordered paid by the county, if it be construed to authorize such an order, is unconstitutional as not "due process of law."

Section 5571, G. S. 1913, after providing what fees and expenses shall

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be allowed and paid for services rendered by the engineer and others under the act, declares that:

"All fees, per diem compensation and expenses provided for in this act * * * shall, in case of a county ditch be audited, allowed and paid upon the order of the county board. In case of a judicial ditch, such fees, per diem compensation and expenses * * * shall be audited, allowed and paid upon the order of the judge of the district court having charge thereof."

There is no hardship on the county when the ditch is established, as the expenses are included in the assessments. But when the proceedings are dismissed the situation is very different. If it is obliged to pay the expenses, and the bond of the petitioners is insufficient in amount to reimburse it, the county and its taxpayers will suffer a loss. That is the present case. We find no escape from holding that the legislature, by the above quoted provision of the statute, and the act as a whole, intended that the county should be primarily liable for the expenses incurred in judicial ditch proceedings, whether the ditch is finally established or the proceedings are dismissed. The idea undoubtedly was that when the ditch petitioned for is not established the petitioners who sign the bond and their sureties shall reimburse the county for the expenses so paid, to the amount of the bond. County of McLeod v. Nutter, 111 Minn. 345, 126 N. W. 1100. When, as in this case, the bond is wholly inadequate, the statute is silent as to how the county is to be reimbursed, and we see no way.

It is true that the engineer is not obliged to accept the appointment and might perhaps refuse to continue the employment until a sufficient bond was filed, thus to an extent protecting himself. But the statute seems to contemplate that he shall be paid irrespective of the amount of the bond. The case of County of McLeod v. Nutter, supra, is conclusive against the liability of the petitioners except as they signed the bond, and to the amount thereof only. The case assumes the primary liability of the county for the expenses.

It is argued that the county is not a party to the proceedings, and has no interest therein until the ditch is established. It is correct that the county is not formally a party, but in view of what was said in Van Pelt v. Bertilrud, 117 Minn. 50, 134 N. W. 226, and the various provisions

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of the statute, it can hardly be held now that it was not intended that the county should be primarily liable for the expense, as well when the proceedings are dismissed as when the ditch is established. It is not a stranger to the proceedings. In addition to the published and posted notice of the hearing required to be given "to all persons interested," the statute (section 5553) provides that a copy of the petition filed with the clerk of the district court, certified by the clerk, shall be filed with the county auditor of each county wherein any of the lands are located. It is provided by section 5555 that a copy of the order appointing the engineer shall be transmitted to the auditor of each county. By section 5556 it is made the duty of the clerk of the court to prepare and transmit to each county auditor a certified copy of the viewers' report. It would seem that the county is as much of a party to the proceedings as are the landowners whose property it is proposed to assess.

We hold that the legislature intended to make the county primarily liable for the expenses when the proceedings were dismissed. We will assume, without so deciding, that this would not violate any constitutional provision had the legislature provided for notice to the county of the application to the court to audit and allow the compensation and expenses of those who have performed services in the proceedings, a right to a hearing and an opportunity to be heard.

It is at once apparent that the quoted provision of the statute does not provide for notice to the county or any of its officers of the hearing on an application to the court to audit, allow, and order paid by the county the compensation and expenses of the engineer or any one who has performed services in the proceedings. The application is ex parte and there is given no right or opportunity to be heard on the part of the county. We find in respondents' brief the statement that the law provides that the bill of the engineer shall be filed with the county auditor. The provision in section 5527 for a filing with the auditor does not apply to judicial ditches. Section 5555 requires the bill to be filed with the clerk of the court, but there is no provision anywhere for notice of hearing. Is this due process of law?

It is a serious matter to declare unconstitutional an act of the legislature, but it is more serious that an individual or a municipality should be obliged to pay out over $6,000 without a chance of being reimbursed,

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without any actual benefit, and without any opportunity to be heard. We have tried in vain to find some way to hold that the county had an opportunity to be heard on this bill at some stage of the proceedings. It had none that we can see, and none is provided for by the statute.

If the court's order approving the account and directing the county to pay it has any validity, it must be that the right to a review on certiorari or one on an appeal, if it were appealable, would not be such an opportunity to be heard as would make due process of law. The case would not be heard de novo here. State v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625; Everington v. Board of Park Commrs. 119 Minn. 334, 138 N. W. 426. There was no more an opportunity for the county to be heard as to the propriety or reasonableness of the engineer's charges in this case than there was for the landowner in State v. McGuire, 109 Minn. 88, 122 N. W. 1120. Of course there can be no distinction between a municipality and an individual. We do not say that the legislature might not impose liability upon the county for expenses where the ditch is not constructed, but that the county is entitled to notice, a right to a hearing, and an opportunity to be heard. Pages of authorities might easily be cited, but it is unnecessary. We may refer however to Taylor, Due Process of Law, § 133, et seq., and the cases cited. We are wholly unable to escape the conclusion that the provision of the statute under which this bill of the engineer was audited and ordered paid is unconstitutional as not due process of law.

The suggestion that the district court is the agent of the county so that it is bound by the order, as it might be by an order of the board of county commissioners, is without merit. The court was the judicial tribunal, the county a necessary party to a controversy before it.

What remedies, if any, the respondent engineer may have to recover just compensation for his services, and expenses authorized by the statute, are questions not before us.

Our conclusion being that the order under review was void, as made pursuant to an unconstitutional provision of the statute, it is needless to consider other questions.

Order reversed.

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HALLAM, J. (dissenting).

I concur in the view that expenses here sued for cannot properly be allowed by the court without notice to the county. I am not sure that they are proper to be allowed at all in a case where the proceeding is dismissed. But I do not agree that section 5571 or any part of it is unconstitutional.

First, in judicial proceedings, the legislature can provide that jurisdiction once acquired shall continue for all purposes until the proceeding is finally terminated, and no notice except the first is jurisdictional, or an essential to due process of law. McNamara v. Casserly, 61 Minn. 335, 343, 344, 63 N. W. 880.

Second, where a statute provides for an interlocutory hearing or proceeding, but does not provide for notice, a requirement of notice is implied. Paulsen v. Portland, 149 U. S. 30, 38, 39, 13 Sup. Ct. 750, 37 L. ed. 637; Gilmore v. Hentig, 33 Kan. 156, 5 Pac. 781; Baltimore & O. R. Co. v. P. W. & Ky. R. Co. 17 W. Va. 812, 835, and, if notice is given, the proceeding is in all respects regular and the statute operative. Gatch v. City of Des Moines, 63 Iowa, 718, 18 N. W. 310.

I think notice should be given of an application to fix and allow the fees authorized by section 5571, and that it should be such a notice as provided in section 5570, but I see no occasion for holding void the part of section 5571 which gives the district court power to determine the proper expense incident to judicial ditches, or, in fact, any part of that section. It will be observed that the part of the section declared void by the majority opinion applies to cases where the ditch is ordered and the expenses are to be assessed against the property benefited, as well as to the case where the proceeding is dismissed.

On November 23, 1917, the following opinion was filed:

PER CURIAM.

We are asked to grant a reargument or modify the opinion so that the statute providing that in case of a judicial ditch all fees, per diem compensation and expenses shall be audited, allowed and paid upon the order of the judge of the district court having charge thereof shall not be held

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unconstitutional if notice is given to the county. The motion for reargument is denied, as is the motion to modify the opinion. But it may be understood that the question whether an order made under the statute would be valid if proper notice was given by order to show cause or otherwise of the application to the court is left open, to be determined when a case shall come before us where such notice has been given.

STATE EX REL. FARIBAULT WOOLEN MILLS COMPANY AND ANOTHER v. DISTRICT COURT OF RICE COUNTY AND ANOTHER.[1]

October 26, 1917.

No. 20,654.

Workmen's Compensation Act — typhoid fever not within definition of accident.

The Workmen's Compensation Law provides compensation for personal injury caused by accident, and then defines the word accident as used therein to mean "an unexpected or unforeseen event, happening suddenly and violently * * * and producing at the time injury to the physical structure of the body." *Held* that typhoid fever caused by drinking infected water is not caused by an accident of the character defined in the law.

Upon the relation of Faribault Woolen Mills Company and Globe Indemnity Company, the supreme court granted its writ of certiorari directed to the district court for Rice county to review the proceedings in that court, Childress, J., under the Workmen's Compensation Act brought by Clara Robertson, as employee, against the first named relator as employer. Reversed.

Raymond N. Caverly, for relators.

James P. McMahon, for respondent.

[1]Reported in 164 N. W. 810.

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TAYLOR, C.

We are called upon to review the action of the district court of Rice county in allowing compensation under the Workmen's Compensation Act to an employee of the relator for temporary disability caused by typhoid fever, the germs of which are alleged to have been ingested by drinking infected water furnished in the relator's factory for the use of its employees. If contracting this disease by drinking infected water was an accident within the definition thereof contained in the law, the evidence is probably sufficient to sustain the findings of the district court. Our statute, so far as here important, provides for compensation "in every case of personal injury * * * caused by accident, arising out of and in the course of employment;" and then provides that the word "accident", as used therein, shall "be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time injury to the physical structure of the body." G. S. 1913, §§ 8203, 8230.

The evidence shows that typhoid fever is a germ disease; that it is produced by taking typhoid bacilli into the alimentary canal; that no deleterious effects result until the bacilli taken into this canal have multiplied enormously, and that it requires more than a week after the infection for the disease to develop sufficiently for its symptoms to be discernable. The disease does not result from an event which happens "suddenly and violently", nor from an event which produces "injury to the physical structure of the body" at the time it happens.

Under statutes which provided compensation for personal injury by accident without defining the meaning of the terms used, there was a diversity of opinion among the courts as to whether diseases, and especially the so-called "occupational diseases," were accidents within the meaning of the statute. The American statutes seem to have been framed largely along the lines of the prior English statute. The English courts held that a disease, unless contracted in consequence of some injury to the physical structure of the body, was not a "personal injury by accident", within the meaning of the English law, until by amendment the law was expressly made to include occupational diseases. See cases cited in L.R.A. 1916A, p. 33, note 28, and p 35, notes 33 and 34. In Finlay v. Guardians of Tullamore Union, 48 Ir. L. T. 110, 7 B. W. C. C.

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973, it was held that typhoid fever was not an accident within the meaning of the law. The courts of Michigan, New Jersey and Ohio seem to have taken the same view as the English courts. Adams v. Acme W. L. & C. Works, 182 Mich. 157, 148 N. W. 485, L.R.A. 1916A, 283, Ann. Cas. 1916D, 689; Liondale B. D. & P. Works v. Riker, 85 N. J. Law, 426, 89 Atl. 929; Industrial Com. v. Brown, 92 Oh. St. 309, 110 N. E. 744, L.R.A. 1916B, 1277. The Massachusetts court distinguished their statute from the English statute on the ground that it omitted the element of accident as a condition to recovery, and held that contracting a disease was "a personal injury," although it might not be an accident. Re Hurle, 217 Mass. 223, 104 N. E. 336, Ann. Cas. 1915C, 919, L.R.A. 1916A, 279; Re Johnson, 217 Mass. 388, 104 N. E. 735. The Wisconsin court held that contracting typhoid fever was an accident within the meaning of their law, but forcible reasons for the opposing view are set forth in the dissenting opinion of Justice Barnes. Vennen v. New Dells Lumber Co. 161 Wis. 370, 154 N. W. 640, L.R.A. 1916A, 273. The circuit court of appeals for the Ninth circuit held that contracting typhoid fever was an accident within the terms of an insurance policy indemnifying against claims "on account of bodily injuries * * * accidentally suffered." Aetna Life Ins. Co. v. Portland G. & C. Co. 144 C. C. A. 12, 229 Fed. 552, L.R.A. 1916D, 1027.

To avoid the uncertainty previously existing and to make clear the class of injuries to which our compensation law was intended to apply, the legislature inserted therein the above quoted definition of what shall be deemed an accident within the purview of such law. By restricting the injuries for which compensation is to be made to those caused by accident and by defining the term accident to mean "an unexpected or unforeseen event, happening suddenly and violently * * * and producing at the time injury to the physical structure of the body," the legislature clearly manifested an intention to exclude from the operation of the law disabilities caused by disease unless the disease resulted from an accident of the character above described, and the courts must give effect to such intention. Industrial Com. v. Brown, 92 Oh. St. 309, 110 N. E. 744, L.R.A. 1916B, 1277.

The disease in the present case was not caused by an accident as that term is defined in the law. The disease germs were not taken into the

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system in consequence of anything which happened "suddenly and violently," or which at the time produced "injury to the physical structure of the body."

Judgment reversed.

STATE EX REL. BERWIND FUEL COMPANY v. DISTRICT COURT OF ST. LOUIS COUNTY AND ANOTHER.[1]

October 26, 1917.

No. 20,679.

Workmen's Compensation Act — limitation of action — amendment not retroactive.

Section 8, chapter 209, p. 294, Laws 1915, which limits the time to recover under the compensation act to one year after the occurrence of the injury, does not apply to claims that accrued before the passage of the 1915 statute.

Upon the relation of Berwind Fuel Company, the supreme court granted its writ of certiorari directed to the district court for St. Louis county, to review the proceedings in that court, Dancer, J., under the Workmen's Compensation Act, brought by Aaron Lindstrom, as employee, against relator, as employer. Affirmed.

K. A. Campbell and *B. Burness,* for relator.

James A. Wharton, for respondent.

HALLAM, J.

Aaron Lindstrom was injured while in the employ of the Berwind Fuel Company, on June 9, 1914. This action or proceeding for compensation was commenced July 9, 1917. The trial court allowed compensation under the compensation act. Relator makes but one contention, that is, that the claim for compensation was outlawed when asserted.

At the time the injury was sustained the original act of 1913 (chapter 467, p. 675, Laws 1913), was in force. This act fixes no limitation upon

[1]Reported in 164 N. W. 812.

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the time within which an action or proceeding shall be commenced. By chapter 209, p. 294, Laws of 1915, section 8, a new section, 20a, was added to the act of 1913, and this provides that action or proceeding by an injured person to recover compensation must be commenced within one year after the occurrence of the injury. This act was approved April 21, 1915, and became effective July 1, 1915, after plaintiff's claim accrued. If section 8 of the act of 1915 applies to plaintiff's claim, then, by its terms, his claim became barred when the act went into effect. If the act of 1913 applies, his claim was not barred.

We need not discuss this question at length. This court has recently held that section 8 of the 1915 law is not retrospective, and that the limitation prescribed by that section does not apply to claims arising before the passage of the act. State v. General A. F. & L. A. Corp. 134 Minn. 21, 158 N. W. 715. That decision is determinative of this case for the facts in the two cases are substantially the same and the principle involved is identical.

Relator asks us to adopt the rule that the holders of claims accruing prior to the 1915 statute are granted the period fixed by that statute after the statute went into effect in which to present their claims. In other words, that the time which elapsed before the statute became operative is disregarded, and the cause of action is to be deemed to have accrued at the time the limitation statute became effective. This rule has been adopted by creditable authority. The fact is, a new statute of limitation enacted in general terms, applied literally, would often bar existing rights of action without a fair chance to present them. Such a result would often be harsh and would sometimes render the statute unconstitutional. To avoid such a result and to give the statute a construction that will enable it to stand, courts have adopted rules of construction which in fact modify the literal meaning of the statute. The rules of construction adopted by different courts are not harmonious.

One rule is to construe the statute as applying only to causes of action arising after its passage, unless a contrary intent is made to appear.

A second rule is to construe the statute as applying only to such existing actions as have already run a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires.

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A third rule is to construe the statute as affecting existing causes of action but as commencing to run at the time when the statute takes effect, so that pre-existing causes of action not already barred are treated as if accruing at the time of the enactment of the new statute.

The last rule is that adopted by the Supreme Court of the United States. Lewis v. Lewis, 7 How. 776, 12 L. ed. 909; Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737. See also 1 Wood, Limitations (4th ed.) p. 76; 25 Cyc. 994; Ann. Cas. 1912A, 1041.

The first rule is, however, the rule adopted in this state. State v. General A. F. & L. A. Corp. 134 Minn. 21, 158 N. W. 715, and cases there cited.

The rules are inconsistent. We cannot adopt any two. We adhere to the rule already firmly established in this state.

Order affirmed.

BEN MILAVETZ v. S. OBERG AND ANOTHER.[1]

November 2, 1917.

No. 20,461.

Building contract — surety not released by changes altering the cost, when.

1. Where a building contract authorizes the owner to make changes in the work to be performed thereunder, and provides that the increase or decrease in the cost resulting therefrom shall be added to or deducted from the contract price, and that any agreement for changes made in writing shall not affect the liability of the sureties, the contractor by making the desired changes and receiving full payment therefor without having the agreement for the changes reduced to writing, waives that formality, and as such waiver does not affect the contract of his sureties in matter of substance they are not released thereby in the absence of an express stipulation to that effect.

Same — payments — evidence sufficient.

2. The evidence is sufficient to sustain the finding of the jury that plaintiff substantially complied with the requirements of the contract in the matter of making payments during the progress of the work.

[1]Reported in 164 N. W. 910.

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Same — surety not released by payments in advance of completion.

3. Payments to the amount of three-fourths of the actual value of the work then performed were required to be made monthly; and the fact that, in consequence of paying these amounts as the work progressed, plaintiff had paid more than three-fourths of the contract price before the completion of the work, did not discharge the sureties.

Same — surety bound by lien judgments.

4. Defendants, having been given a proper opportunity to defend the action brought to enforce the liens filed against the building for labor and material, are bound by the judgment rendered therein.

Same — measure of damages — harmless error.

5. Making the judgment recovered against the contractor the measure of defendants' liability was not reversible error, although no proof was offered to show the nature or validity of the claims for which such judgment was rendered, as the amount thereof was less than the amount of the liens as established by the judgment in the lien action.

Action in the district court for St. Louis county against S. Oberg and Matt Lofbacka, sureties on a building bond of one Dahlvik, a building contractor, to recover $1,894.15 for mechanics' liens paid by plaintiff and the amount of a judgment obtained by plaintiff against Dahlvik. The case was tried before Hughes, J., who at the close of the testimony denied the motion of defendant Oberg for a directed verdict, and a jury which returned a verdict for $1,946.23. Defendant Oberg's motion for judgment notwithstanding the verdict was denied, and defendant Lofbacka's motion for judgment notwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the verdict, defendants took separate appeals. Affirmed.

John Jenswold and *John D. Jenswold,* for appellants.

Daniel W. Morgan and *Edmund M. Morgan,* for respondent.

TAYLOR, C.

Oscar Dahlvik contracted to erect a dwelling house for plaintiff and to furnish all the labor and material therefor, and gave a bond, executed by defendants as sureties, to secure the performance of the contract and the payment of all obligations incurred for labor and material and to hold plaintiff harmless from any claim on account thereof. He erected

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the house and received the contract price therefor, but failed to pay certain claims for labor and material. Liens were filed against the property for these claims and were subsequently foreclosed. Thereafter plaintiff brought suit against Dahlvik and recovered a judgment but an execution thereon was returned unsatisfied. He then brought this suit against defendants, as sureties on Dahlvik's bond, and recovered a verdict. Defendant Lofbacka made an alternative motion for judgment notwithstanding the verdict or for a new trial. Defendant Oberg made a motion for judgment notwithstanding the verdict but did not ask for a new trial. These motions were denied. Judgment was entered, and the defendants took separate appeals therefrom.

Defendants contend that they have been released from liability on the bond, and in support of that contention they assert: (1) That plaintiff made changes in the building not agreed upon in writing; (2) that plaintiff made payments to Dahlvik at different times, in different amounts, and in a different manner than the contract provides; (3) that plaintiff increased the cost of the work by wrongfully interfering with and hindering the performance thereof by Dahlvik and his employees.

1. The contract gave plaintiff the right to deviate from the plans and specifications and make any changes in the building that he should deem proper, and provided that the increase or decrease in cost resulting from such changes should be added to or deducted from the contract price. The bond made the contract a part thereof, and then provided that the bond should not be invalidated by any changes agreed upon in writing by plaintiff and Dahlvik. It contained no expressly prohibitive provisions. During the construction of the building, the plans and specifications were departed from in certain particulars at plaintiff's instance. Plaintiff testified that a writing specifying all the changes of any consequence and the amounts agreed upon therefor was signed and given to Dahlvik; and that the full cost of such changes, amounting to the sum of $319, had been paid in addition to the contract price. Defendants asserted that this writing had not been signed, and that changes not specified therein had been made. The court charged the jury to the effect that, if plaintiff made changes in the building, this fact released defendants from liability, unless the changes were agreed upon and the agreement was reduced to writing and signed by plaintiff and Dahlvik, or

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unless the jury found that plaintiff had paid Dahlvik the full value of all such changes and that defendants had been in no manner prejudiced by them. By their verdict the jury necessarily found either that the changes made had been agreed upon in writing or that they had been in no manner prejudicial to defendants.

Defendants contend that, if changes were made in the building which were not agreed upon in writing, they are released from liability under the bond, even if such changes were not prejudicial but beneficial to them; that as sureties who received no compensation for becoming such, any deviation from the strict letter of the bond, even if it enured to their benefit, discharged them from liability. In support of this contention they cite: Board of Co. Commrs. of Fillmore County v. Greenleaf, 80 Minn. 242, 83 N. W. 157; Board of County Commrs. of Renville County v. Gray, 61 Minn. 242, 63 N. W. 635; Flanigan v. Phelps, 42 Minn. 186, 43 N. W. 1113; Simonson v. Grant, 36 Minn. 439, 31 N. W. 861; Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62; Tomlinson v. Simpson, 33 Minn. 443, 23 N. W. 864. In the first three cases cited, the instrument itself upon which suit was brought had been materially altered after its execution without the knowledge or consent of the sureties, and they were held not liable on the ground that the instrument sued upon was not the instrument they had executed. None of these cases involved building contracts. In Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62, which involved a building contract, the owner had made changes which increased the cost of the work, and it was held that the sureties were discharged thereby; but the contract contained no provision authorizing the owner to make changes. In Simonson v. Grant, 36 Minn. 439, 31 N. W. 861, which also involved a building contract, the sureties were held not liable because the owner had failed and refused to make payments to the contractor as stipulated in the contract. The effect of changes in the work made at the instance of the owner was not involved or considered. In Tomlinson v. Simpson, 33 Minn. 443, 23 N. W. 864, no claim was made that the surety had been released from liability upon the bond, and the court merely determined the extent of such liability.

The instant case is distinguished from all the cases above cited by the fact that the plaintiff was authorized by the contract to make the changes in controversy. The question here is not whether the sureties were re-

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leased by the making of unauthorized changes; but whether they were released by the making of authorized changes, unless such changes were agreed upon in writing in the manner provided in the contract. In other words, whether the mere failure to provide written evidence of the agreement for the changes released them. While there are decisions to the contrary, the weight of authority is to the effect that the contractor waives a provision that changes shall be ordered or agreed upon in writing by making the changes without requiring written authority for them, and that his waiver of this formality is not a matter of substance, and does not operate to release his sureties. Prescott Nat. Bank v. Head, 11 Ariz. 213, 90 Pac. 328, 21 Ann. Cas. 990; Bartlett & Kling v. Illinois Surety Co. 142 Iowa, 538, 119 N. W. 729; Hohn v. Shideler, 164 Ind. 242, 72 N. E. 575; Enterprise Hotel Co. v. Book, 48 Ore. 58, 85 Pac. 333; De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 402; Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669. It was so held by this court as to a compensated surety. Brandrup v. Empire State Surety Co. 111 Minn. 376, 127 N. W. 424. See also Consaul v. Sheldon, 35 Neb. 247, 52 N. W. 1104; Hinton v. Stanton, 112 Ark. 207, 165 S. W. 299; Cowles v. U. S. Fidelity & Guaranty Co. 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838; U. S. v. Walsh, 115 Fed. 697, 52 C. C. A. 419.

The mere omission to put the agreement for the changes in writing did not affect the contract of the sureties in matter of substance, and, being without substantial prejudice to them, did not operate to release them from liability in the absence of an express stipulation that such omission should invalidate the bond.

2. The contract provided for payments, on or before the tenth day of each month, to the amount of 75 per centum of the actual value of the work done during the preceding month, and that plaintiff should retain the remaining 25 per centum thereof until the completion of all the work, as additional security for the performance of the contract. The jury by their verdict found that there had been no substantial departure from these requirements, but defendants contend that this finding cannot be sustained under the evidence. We will consider briefly the more important grounds upon which they base this contention.

Dahlvik began work about the first of October and at his request pay-

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ments were made during that month amounting to $205. Defendants insist that these payments were not due until November, and that plaintiff violated the contract by making them in October. The contract provided for payment for the work performed in any month, "on or before the 10th day" of the following month, and we see no violation of the contract in making payments during the month in which the work was performed, so long as such payments did not exceed 75 per centum of the value of the work performed at the time they were made.

Plaintiff was under the necessity of determining for himself the value of the work done in each month as the contract made no provision for determining such value. He claims to have determined such value according to his best judgment, and to have paid Dahlvik the proportional part thereof due under the contract. At the time the payments were made, they were accepted without any question being raised as to the correctness of the amounts. Defendants now insist, however, that the payments for each month were in fact much less than the amount due for the work performed in such month. The evidence leaves both the amount and the value of the work performed in the different months uncertain and indefinite. Defendants base their contention upon estimates made by Dahlvik while on the witness stand. These estimates for the different months, when added together, make a total which exceeds the contract price by more than 50 per cent. The jury could well find that they were inaccurate and excessive. They were by no means conclusive, and we are unable to say that the conclusion reached by the jury is not justified by the evidence.

Dahlvik applied for and obtained $1,000 from plaintiff to pay defendant Lofbacka for material purchased from him. Defendants now assert that plaintiff violated the contract by making this payment, for the reason that only a part of this material had then been furnished and none of it had then been incorporated into the building. As defendants also claim that more than this amount had been earned and remained unpaid at the time of this payment, they are not in position to claim that the payment was prematurely made; and so far as appears Dahlvik had the right to pay this money to Lofbacka if he so desired.

Defendants insist that plaintiff gave Dahlvik a promissory note of $400 due in 90 days and thereby obtained an extension of time which

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violated the contract. The testimony justifies a finding that Dahlvik applied to plaintiff for money to pay the plumber which plaintiff declined to furnish at that time; that the plumber offered to take plaintiff's note for $400 due in 90 days; that at the request of Dahlvik and the plumber and pursuant to an agreement that the note should be transferred to and accepted by the plumber for the balance due him from Dahlvik, plaintiff executed it; that as a part of the same transaction it was transferred to and accepted by the plumber as agreed, and that plaintiff subsequently paid it. The note was given to discharge Dahlvik's obligation to the plumber and accomplished that purpose. It was given to accommodate Dahlvik and satisfy the plumber, not to accommodate plaintiff, and was equivalent to money so far as Dahlvik was concerned. The jury were justified in finding that neither Dahlvik nor defendants had been prejudiced thereby.

Defendants, although strenuously insisting that plaintiff ought to have made larger monthly payments than he in fact made, complain because he did not retain one-fourth of the contract price and have it on hand at the completion of the work. The contract required plaintiff to make monthly payments, "to the amount of seventy-five per cent (75 %) of the actual value of the work done during the preceding month." The actual value of the work performed was made the basis for measuring and determining the amounts to be paid as the work progressed, and defendants do not claim that the payments made exceeded three-fourths of such value. On the contrary, they claim that the payments were less than that amount. The jury having found that the payments were made substantially in accordance with the rule prescribed therefor, the fact that, in consequence of making such payments, plaintiff had less than one-fourth of the contract price on hand at the completion of the work did not discharge the sureties. Graves v. Merrill, 67 Minn. 463, 70 N. W. 562; George A. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 128 N. W. 12, 33 L.R.A.(N.S.) 513.

3. Plaintiff acted as his own superintendent and from time to time gave directions as to the manner in which the work should be performed. Defendants claim that he wrongfully interfered with the work and increased the cost thereof to their prejudice. The court charged the jury that defendants were released if plaintiff, by interfering with work which

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was being properly performed, substantially increased the cost thereof. The evidence made this a question for the jury, and they found against defendants' contention.

4. The judgment establishing and foreclosing the liens was offered and received in evidence. There was other evidence as to the filing of liens against the property for labor and material, but no other evidence to establish the amount or validity of such liens. Defendants contend that they are not bound by this judgment as to either the amount or the validity of the liens. If they were properly notified to come in and defend the lien action, they are concluded by the judgment rendered therein. Trustees of F. P. C. of Duluth v. U. S. Fidelity & Guaranty Co. 133 Minn. 429, 158 N. W. 709, and cases cited therein. When plaintiff, at the trial of the present action, wished to procure the files for the purpose of proving a notice to defendants to defend the lien action and an agreement to do so, defendants assured him that such proof was unnecessary as they made no claim that they had not been given the opportunity to defend that action, and plaintiff rested upon this assurance. Defendants cannot now take advantage of plaintiff's failure to present such proof.

5. After the liens had been established against the property in the action brought to enforce them, plaintiff brought suit against Dahlvik and the defendants as sureties on his bond, apparently on the contract, and obtained a judgment for an amount somewhat less than the aggregate amount of the liens. While the sureties were named as defendants in that action, what part they took therein does not appear, and the judgment is against Dahlvik alone. This judgment was received in evidence without objection, and the court charged the jury that, if they found that defendants had not been released from liability on the bond, they should return a verdict for plaintiff in the amount of this judgment. The verdict returned is for the exact amount of this judgment. Defendants contend that this judgment is not evidence against them of anything except its own existence; that, as plaintiff presented no evidence to prove that it was rendered for the claims which defendants had obligated themselves to pay, it cannot be made the measure of their liability. The judgment was received in evidence without objection, and the parties and the court doubtless understood, at the time, that it was presented for the

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purpose of fixing the amount of defendants' liability in case the bond was found to be still in force. The action in which it was rendered had been tried by the same attorneys and before the same court, and the defendants herein were parties to the action, although not parties to the judgment. But conceding defendants' contention to be well founded, we fail to see how they have been prejudiced by making this judgment the measure of their liability in the present action. They were unquestionably bound and concluded by the judgment establishing the amount of the liens, and this amount as so established materially exceeded the amount of the judgment in question. If this judgment had not been received in evidence defendants' liability, so far as the record shows, would have been measured by the amount of the liens as established in the other judgment. To give this judgment the effect of reducing that liability was not to the prejudice of defendants.

So far as important, the assignments of error are directed to one or more of the above questions, and the orders appealed from are affirmed.

GEORGE N. SMITH v. EDWARD G. INCE.[1]

November 2, 1917.

No. 20,465.

Process — affidavit for service by publication — "in this state" sufficient.

In actions to quiet title the statute permits service by publication "when the subject of the action is real or personal property within the state," etc., and the affidavit is required to state such ground. An affidavit stated "that the subject of this action is real property in this state," but did not give the name of the state. It is *held* that the affidavit was sufficient and that jurisdiction was acquired.

Action in the district court for Hennepin county to determine adverse claims to a vacant and unoccupied lot. The answer alleged that defendant was owner in fee simple of the land. The case was tried upon

[1]Reported in 164 N. W. 903.

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stipulated facts before Fish, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Andrew Fawcett, for appellant.

John T. Hughes, for respondent.

DIBELL, C.

Action to quiet title. Judgment for the plaintiff. The defendant appeals.

The plaintiff's title rests upon a judgment quieting title rendered in 1910 in favor of one Johnson against one Thwing. If that judgment was valid the plaintiff's title is good; otherwise title is in the defendant. Service was by publication and the judgment is good if jurisdiction was acquired. Jurisdiction was acquired if the affidavit of publication was sufficient. The statute permits service by publication in the following among other cases: "When the subject of the action is real or personal property within the state, in or upon which the defendant has or claims a lien," etc. G. S. 1913, § 7738, subd. 5. The affidavit must state the ground for publication. G. S. 1913, § 7737. The affidavit stated as follows: "That the subject of this action is real property in this state and that the above named defendants, and each of them, have or claim a lien," etc. The defendant claims that the affidavit is insufficient because it did not state that the real property was within the state of Minnesota. No other defect is claimed. The action was brought in Hennepin county and the venue of the affidavit was there. The defendant relies upon Gilmore v. Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. 376. There the affidavit stated that the defendant "has property in this city and is the owner of the property described in the complaint." There was the usual venue to the affidavit. It was held that the affidavit could not be aided by reference to the complaint and that it was insufficient. There is a fair distinction between that case, which indeed went quite far enough, and this. There it was alleged that the defendant had property in "this city," but the city was not located either by reference to the county or to the state. Here the allegation is that the real property which is the subject of the action is "in this state," and the venue of the affidavit is laid in Hennepin county, Minnesota. The words "this state"

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are referable to no other than Minnesota. The statute uses the words "the state." If the affidavit is not good it is because the name of the state must be given in the body of it. We think this is not the requirement. There must be a strict compliance with the statute to make effective constructive service. This affidavit constitutes such compliance.

Judgment affirmed.

WILLIAM F. MARKUS v. CITY OF DULUTH.[1]

November 2, 1917.

No. 20,490.

Suspension of officer — proceeding under civil service regulations.

1. In the absence of statute so declaring, the commencement of proceedings under civil service regulations for the removal of a public officer does not of itself operate as a suspension of the officer pending the proceeding, nor deprive him of the right to continue in the office and receive the compensation incident thereto.

Compensation of de jure officer — payment to de facto officer.

2. The payment of the compensation to a de facto officer who is installed in the office with notice of the rights of the de jure officer, who is wrongfully excluded from the office, is no defense to an action by such de jure officer to recover the compensation for the period during his wrongful exclusion.

Removal of officer.

3. Proceedings for the removal of a public officer under civil service regulations, when removal can be made for cause only, are judicial in character and an order of removal issued therein takes effect and becomes operative from its date.

Same — effect of order of removal.

4. Where there is no suspension of the officer pending the proceeding the order does not relate back to the date of the commencement thereof.

[1]Reported in 164 N. W. 906.

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Action in the district court for St. Louis county to recover $600 salary as building appraiser from April 1, 1916, to October 1, 1916. The case was tried before Ensign, J., who at the close of the testimony denied plaintiff's motion for a directed verdict for the amount demanded, and a jury which returned a verdict for $510.75. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

John E. Samuelson, Leonard McHugh and *M. T. O'Donnell,* for appellant.

W. H. Gurnee, for respondent.

BROWN, C. J.

At the time of the adoption of the home rule charter of the city of Duluth in the year 1912 plaintiff was and for some time prior thereto had been in the employ of the city as a "building appraiser;" his services being rendered under the direction of the city assessor. His tenure of office was indefinite as to time, but the position came within the civil service provisions of the charter, and under section 36 thereof plaintiff was entitled to retain it until removed for cause by the civil service commission. He was dismissed from the service by the city assessor on June 1, 1913, without authority, for a removal of one holding the particular office could only be made by the civil service commission. No charges were preferred against him and he was afforded no opportunity to be heard before the order of dismissal was made. The evidence justified the jury in finding as a fact that he protested against his summary removal, and did not acquiesce therein, nor abandon his claim to the office. He was subsequently given other temporary employment in the assessor's office, but was never reinstated to his former position, or subsequent to his dismissal permitted to perform the duties thereof. At the time he was so dismissed from the service one McLean was appointed to a position in the office, to whom were assigned the duties of building appraiser, being those theretofore performed by plaintiff. Whether McLean was appointed as the successor of plaintiff is not made clear by the record. The assessor, who made the appointment, testified that he did not think his act of appointment should be so construed. But, whatever may have been the intention in that respect, it remains clear that McLean thereafter performed in part, if not all, the duties of the particular position and

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was paid therefor by the city. Not being successful in his efforts to gain reinstatement to his former position, plaintiff brought an action in March, 1916, to recover the compensation attached thereto, for and during the time he had been excluded therefrom and up to the first day of April, 1916. He established his right to recover in that action and was awarded a verdict which was subsequently paid by the city. Immediately thereafter proceedings were commenced before the civil service commission for plaintiff's removal. Charges of incompetency were filed upon which a hearing was had which resulted in a formal order of removal by the commission, bearing date June 23, 1916. Being dissatisfied with such order plaintiff sued out a writ of certiorari in review thereof by the district court. The order was reversed and in all things set aside by an order of the court of date August 31, 1916. The reasons or grounds upon which the court based the order are not here material. Thereafter, on October 6, 1916, plaintiff brought this action to recover the salary attached to the office for the period from April 1 to October 1, 1916. A verdict was returned in his favor and from a judgment rendered thereon defendant appealed.

1. The case as presented by the record does not call for extended discussion. Plaintiff's recovery in the former action necessarily established his right to the office, as the de jure officer; that he had been illegally and wrongfully removed therefrom, had not abandoned the office and was entitled to the compensation attached thereto by law during the time he was wrongfully prevented from discharging the duties of the same. Such facts were essential to his right of recovery, and nothing appearing to the contrary we are bound to assume that they were found in his favor. Defendant's counsel recognized this situation and following the former verdict caused removal proceedings to be commenced to formally and finally oust plaintiff from the office. But the commencement of those proceedings did not as a matter of law suspend the rights of plaintiff during the pendency thereof. Rees v. City of Minneapolis, 105 Minn. 246, 117 N. W. 432. There was no order of suspension, at least none appears from the record, and plaintiff's rights continued pending such proceedings precisely as they had previously existed. On similar facts we have held the excluded officer entitled to recover. Parish v. City of St. Paul, 84 Minn. 426, 87 N. W. 1124, 87 Am. St. 374; Larsen v. City of

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St. Paul, 83 Minn. 473, 86 N. W. 459; Sclawr v. City of St. Paul, 132 Minn. 238, 156 N. W. 283. See also People v. Stevenson, 272 Ill. 215, 111 N. E. 595; and U. S. v. Wickersham, 201 U. S. 390, 26 Sup. Ct. 469, 50 L. ed. 798. Windom v. City of Duluth, 137 Minn. 154, 162 N. W. 1075, is not in point. The evidence made the question whether plaintiff acquiesced in his dismissal from the office one of fact and the verdict of the jury is fully sustained.

2. Subsequent to the recovery in this action defendant revived the removal proceedings pending before the civil service commission, amended the petition therein and thereafter, on further hearing the commission in December, 1916, made a valid order of removal, thereby effectually terminating plaintiff's right to the office. The contention of defendant that the order of removal relates back to the commencement of the original proceeding, and takes effect as of that date, namely, June 9, 1916, is not sustained. The proceeding for the removal of plaintiff was judicial in character, and the order entered therein has the force and effect of a judgment, effective and operative from its date. The question probably would present a materially different aspect in a case where the officer was suspended during the removal proceedings. But there was no such suspension. State v. Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. 534.

3. The further contention that since another was appointed to the office and performed the duties and was paid the salary attached thereto plaintiff, though the de jure officer, is not entitled to recover for the period during which the de facto officer was so discharging the duties and receiving the compensation, cannot be considered, for it was not presented to the court below. And, moreover, the evidence does not show that McLean was appointed to the particular position, or as the successor of plaintiff. In fact the city assessor, the appointing power, leaves the matter by his testimony in much doubt. So we pass the point without further remark, except to say, that if the contention made is not in conflict with the Parish, Larson and Sclawr cases above cited, it can have application only in cases where the payment to the de facto officer is made in good faith, and without notice of the rights of the de jure officer. Such facts do not appear in this case. The former recovery necessarily established plaintiff's de jure title and right to the office. That

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was a judicial determination of his rights of which defendant was fully advised, for it was a party to that action. And, conceding the rule for present purposes to the extent just stated, payments to the de facto officer thereafter made cannot well be said to have been made without notice of the rights of plaintiff. The converse of the proposition affirmatively appears, as well as the fact that the payments were entirely voluntary. In that situation the fact that the de facto officer has received the salary cannot be interposed to defeat plaintiff's de jure claim. Fylpaa v. Brown County, 6 S. D. 634, 62 N. W. 962. In Parker v. Board of Suprs. of Dakota County, 4 Minn. 30 (59), the payment to the de facto officer was without notice of the rights of the de jure claimant. We do not question the rule of that case.

This covers the case, and all that need be said in disposing of the points made. The evidence supports the verdict, and there were no errors on the trial justifying a new trial.

Judgment affirmed.

JAMES E. TRASK v. EMILY V. SKOOG.[1]

November 2, 1917.

No. 20,498.

Taxation — notice of expiration of redemption — name of person to whom assessed.

Land is assessed, within the meaning of section 2148, G. S. 1913, on the day the assessor certifies and returns to the auditor the assessment books wherein the assessor has valued the land for the purposes of taxation. And from and after that date a notice to terminate the right of redemption from a tax sale, issued before another assessment is made and returned by the assessor, must be directed to the person in whose name the land is assessed upon the books so certified and returned by him.

[1]Reported in 164 N. W. 914.

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Action in the district court for Ramsey county to determine adverse claims to certain vacant and unoccupied real estate. In her answer defendant specifically alleged that she was the owner in fee simple. The case was tried before Brill, J., who made findings and ordered judgment in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

James E. Trask, pro se.

Sanborn, Graves and *Appel,* for respondent.

HOLT, J.

This appeal presents the sole question whether the notice to eliminate the right of redemption in real estate tax proceedings must always be directed to the person in whose name the land was last assessed by the assessor, and that is, with rare exceptions, in even numbered years.

The facts are these: In 1914 the lots in controversy were assessed in the name of M. J. McVean. October 15, 1914, James E. Trask, the plaintiff, obtained a decree, based upon city assessment certificates, quieting the title to the lots in himself. The transfer effected by this decree was immediately entered by the county auditor in the book in his office designated as "The Grand List of Taxable Lots, Transfer Book and Record of Delinquent Tax," so that therein plaintiff appeared as the last grantee in the title. Upon the book called "Real Estate Tax Duplicate for 1915" the name of plaintiff appears as owner of the lots. The notice of expiration of redemption was issued May 15, 1916, and was directed to M. J. McVean. It was and is conceded that if this notice was directed correctly defendant is the owner of the lots; if not, plaintiff is. The trial court held the notice valid and ordered judgment for defendant. Plaintiff appeals from the order denying a new trial.

The statute applicable is section 2148, G. S. 1913, which, so far as here material, reads: "Every person holding a tax certificate * * * may present such certificate to the county auditor; and thereupon the auditor shall prepare * * * a notice, directed to the person in whose name such lands are assessed, specifying * * *. If, at the time when any tax certificate is so presented, such lands are assessed in the name of the holder of the certificate, such notice shall be directed also to the person in whose name title in fee of such land appears of record in the office of the regis-

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ter of deeds." Then follow provisions in respect to the delivery of the notice to the sheriff for service, and a form for the notice. The part of the section directly involved in this appeal is the clause, "directed to the person in whose name such lands are assessed," and the decision must turn upon the meaning therein of the word "assessed."

Appellant contends that the primary meaning of the word "assess" is to apportion the amount of the tax to be raised, hence refers to the work of the auditor, and that only in its secondary or derivative meaning does it apply to the valuation by the assessor of property for the purposes of taxation, citing 5 C. J. p. 813. He also fortifies this position by referring to such sections as 1981 and 1995, G. S. 1913, which ordain that the auditor shall annually provide the necessary assessment books and that the assessor shall perform his duties during the months of May and June each year, thus drawing the inference that each year there is an assessment made and hence in the assessment book or record for each year are to be found the persons in whose names the lands are assessed.

The learned trial court, in the memorandum filed, aptly disposed of appellant's contentions thus: "The words 'assess' and 'assessed,' however used elsewhere, in the statutes of this state relating to taxation refer to and have from beginning referred to the valuation of property by the assessor. The county auditor furnishes the lists of all real property to the assessor. The auditor fixes the rate of taxation from data supplied him by the taxing authorities, he computes and extends the tax upon the assessed valuation made by the assessor, or that valuation as corrected by the reviewing board. If in a very limited general sense it may be said that the auditor assesses the taxes, he does not in any sense assess the property."

The meaning of "assessed" in said section 2148 was virtually determined more than 20 years ago, in Eide v. Clarke, 57 Minn. 397, 59 N. W. 484. It was there held that "lands 'are assessed,' for the purpose of this notice, when the assessor returns the assessment book, properly filled out, to the county auditor, as provided in section 41 (section 2029, G. S. 1913); and the name of the person then stated in the assessment book as owner of a parcel of land is the person in whose name the land is then assessed." The assessor assesses or values real estate for the purposes of taxation only in even numbered years, except that in odd numbered

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years improvements made since the previous assessment and real estate which since then has ceased to be exempt are assessed and returned by the assessor with the assessment of the personal property. In even numbered years the assessor shall also make a separate list of real estate exempt for taxation and value the same. Sections 1979, 1989 and 1990, G. S. 1913. The books upon which the assessor enters his assessments or valuations are prepared and furnished by the auditor. When the assessor has completed his work he returns them with his certificate to the auditor as provided in section 2029, G. S. 1913. This act of the assessor fixes the exact time after which redemption notices must be directed to the person named as owner of any tract of land described in such books until the next time at which the assessor makes a similar return on that tract. We must take notice that, aside from the exceptions mentioned, real estate is thus assessed in even numbered years only. Hoyt v. Chapin, 85 Minn. 524, 89 N. W. 850; Sterling v. Urquhart, 88 Minn. 495, 93 N. W. 898. It was held in Walker v. Martin, 87 Minn. 489, 92 N. W. 336, that a notice of redemption could not issue where there had been no such assessment by an assessor, although there had been an extension of taxes against the land, the court saying: "Land is assessed for the purpose of addressing the notice of the expiration of the period of redemption when the assessor returns the assessment book to the county auditor." It was stipulated that the lots here involved were vacant, and the "Real Estate Tax Duplicate Book" for 1915, in which plaintiff appeared as owner of the lots, was not a book wherein the assessor had entered an assessment or upon which he had made any return as provided by section 2029, G. S. 1913.

Sections 1981 and 1985, G. S. 1913, and other provisions relating to the imposition and enforcement of taxes, must be read in connection with sections 1979 and 2029. Thus read no books are required to be prepared by the auditor for the assessor in odd numbered years in respect to real estate, except such as are to cover improvements added since the last assessment by the assessor and exempt property restored to taxation. The testimony also shows that the "Real Estate Tax Duplicate Book" for 1915, above referred to, was prepared by the auditor from the assessment books returned by the assessor the previous year and from such information as to ownership as could be derived from the "Grand List of

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Taxable Lots" before mentioned. It was not a record or book that ever came into the hands of the assessor, but was one made entirely by the auditor from data he had for the purpose of computing and extending the tax for that year and then turning it over to the county treasurer for collection of the taxes therein computed. The auditor starts the work on these books, as well as on those of real estate assessment books turned over to the assessor in the even numbered years, in the early part of each year and his work on all of these books is not completed until late in the fall so that they are delivered to the treasurer before the year expires.

The purpose of the notice of redemption is unquestionably to reach the true owner so that he may protect his title. But since ownership is sometimes uncertain, or not easy to ascertain, the law prescribed the method which was thought most likely to bring home the information to the owner and, at the same time, be so definite and certain that the officials charged with the preparation and service of the notice could comply with the law with that exactness demanded when it came to the final step of transferring title to land for failure to pay the tax thereon. We think the word "assessed" in section 2148 should be permitted to retain the meaning adopted in Eide v. Clarke, supra. We have then a workable, definite rule for directing and serving the notice of redemption which, take it all in all, is best adapted to protect both the owner and the holder of the tax certificate.

The trial court rightly held that the notice was properly directed.

Order affirmed.

J. O. LENNING v. RETAIL MERCHANTS MUTUAL FIRE INSURANCE COMPANY.[1]

November 2, 1917.

No. 20,519.

Insurance — incorporation of insured after issue of policy — knowledge of insurer before renewals.

1. In December, 1907, defendant issued its certain policy of insurance

[1] Reported in 164 N. W. 908.

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to the copartnership of Seaman & Martin; in July, 1909, during the life of the policy the members of the copartnership formed a corporation under the name of Seaman-Martin Company; defendant continued thereafter to renew the insurance and it was in force at the time the property covered thereby was destroyed by fire on April 10, 1911. It is *held*, following a former decision in the case: (a) That the evidence presented a question of fact upon the issue whether defendant had knowledge of the formation of the corporation, and with that knowledge issued and renewed the policy of insurance upon which the action is founded, knowing also that the corporation then owned the insured property; and (b) that the verdict of the jury thereon is not clearly against the weight of the evidence.

Same — admission of evidence.

2. There were no errors in the admission of evidence.

Same — payment of premium waived.

3. The evidence justified the jury in finding that defendant waived the prompt payment of the premium due on the policy preceding the fire.

Same — case followed.

4. General Statutes 1913, § 3306, and the by-laws of the company, which form a part of the insurance contract, to the effect that a failure to pay the premium within the time thereby prescribed shall without notice or other act on the part of the company void the contract, do not preclude a waiver of such payment by the acts and conduct of the insurance company. Johnson v. Retail M. M. F. Ins. Co. 112 Minn. 418, followed and applied.

Action transferred to the district court for Hennepin county to recover $2,503.83 upon defendant's policy of insurance. The answer expressly denied that at any time defendant issued or delivered its policy to Seaman-Martin Company, alleged that in November, 1909, it issued its policy agreeing to insure Seaman & Martin, a copartnership, and a renewal of the same in November, 1910, and that it intended to insure the partnership and did not intend to insure the corporation. The answer also set out defendant's by-law that a policy should be void upon failure of a member for 60 days to pay the premium. The case was tried before Dickinson, J., who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony its motion for a directed verdict, and a jury which returned a verdict for $3,357.62.

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From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Ernest Malmberg and *Thomas Kneeland,* for appellant.

Washburn, Bailey & Mitchell, for respondent.

BROWN, C. J.

Action to recover upon a policy of fire insurance in which plaintiff had a verdict and defendant appealed from an order denying its alternative motion for judgment or a new trial. A former appeal is reported in 129 Minn. 66, 151 N. W. 425.

It appears that F. S. Seaman and T. H. Martin sometime in 1904, as copartners under the firm name of Seaman & Martin, organized and established a mercantile business at Deer River, this state, and thereafter conducted the same until about June 1, 1909, when the business was transferred to a corporation the copartners were instrumental in forming at that time. The corporation was named Seaman-Martin Company. The capital stock thereof was fixed at 50 shares, of which Seaman took 25 shares, Martin 20 shares, and two and one-half shares were issued to Martin's wife. Thereafter the business was conducted substantially as before the formation of the corporation.

In November, 1907, on proper application defendant, a mutual mercantile insurance company, issued to the copartnership an insurance policy covering the stock of goods and fixtures in their store building, which expired by its terms on December 8, 1908. Prior to such expiration defendant, without any new application, renewed the policy for another year, or until December 8, 1909. During the life of this renewal and on about June 1, 1909, the corporation was formed and took over the property and business covered by the insurance as heretofore stated. In November, 1909, following the organization of the corporation the defendant, without any application therefor, issued a new policy insuring the same property from December 8, 1909, to December 8, 1910. The policy was issued to Seaman & Martin, and transmitted to the firm at Deer River, but was received by the officers of the corporation. Defendant claims that at the time of issuing this policy and the subsequent renewal thereof it had no notice or knowledge of the corporation or of the change in the ownership of the property, and supposed and understood

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that it was still dealing with the copartnership. The premium for this policy was due 60 days from the date thereof, or early in February, 1910. It was not paid, and for the default defendant gave notice of the cancelation of the policy on July 27, 1910. Upon the receipt of this notice the officers of the corporation immediately remitted the amount of the premium, which defendant received and retained though it made no formal reinstatement of the policy. In November following defendant recognized the policy so canceled as an existing contract by the issuance of a certificate of renewal, thereby extending the policy up to December 8, 1911. This renewal was issued a year and six months after the formation of the corporation, but the certificate of renewal was in the name of Seaman & Martin. The premium for this renewal was due on February 8, 1911, but it was not paid. The property covered by the insurance was destroyed by fire on April 10, 1911. Thereafter and on the same day the corporation remitted the amount of the premium, by draft or check, which on the thirteenth day of April was returned by defendant with the statement that the policy had been canceled for the default in the payment of the premium within the time fixed by the contract. Due proofs of loss were thereafter made and served, but defendant refused to admit liability and declined payment. This action was then brought by plaintiff, an assignee of the policy, to recover thereon.

Two questions of fact were submitted to the jury on the trial below, namely: (1) Whether any contract was ever entered into between defendant and the corporation, successor of the copartnership; and (2) whether defendant waived the prompt payment of the premium which fell due on February 8, 1911. Both were answered by the verdict in plaintiff's favor. Defendant contends that the evidence is insufficient to support the verdict in either respect. This contention presents the principal question on this appeal.

On the former trial the action was dismissed when plaintiff rested, on the ground that the evidence wholly failed to connect the corporation with the contract, by bringing home to defendant at any time prior to the fire knowledge of the organization thereof, or the fact that the copartnership had ceased to conduct the insured business, or to connect the corporation with the contract in any other way. That view of the evidence we held erroneous on the former appeal, the conclusion reached

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being that the evidence then presented made the question one of fact for the jury, and a new trial was granted. Insofar as the evidence now presented is the same as that received on the former trial that decision will be followed and applied as the law of the case. And unless the evidence shown by the present record is substantially different, and of a character to require the conclusion that defendant had no knowledge of the corporation at any time prior to the issuance or renewal of the policy in suit, from which it would follow as a matter of law that there existed no contract with the corporation, the action of the court in submitting the question to the jury must be sustained.

1. The result of a careful examination of the record, which was substantially added to by new evidence offered on this trial by both parties, is that a fair question of fact was presented, and that within the rule guiding us in such cases the verdict should not be disturbed. The additional evidence offered by plaintiff tends strongly to corroborate the claim that defendant in fact received information as to the change of ownership of the insured property prior to the issuance of the renewal certificate in December, 1910. While the secretary of defendant, who had sole charge of its business as respects the issuance of insurance policies and renewals thereof, denied such knowledge, his denial, though supported to some extent by other evidence, is insufficient to justify this court in concluding that the case as made by plaintiff's evidence was overcome.

The organization of the corporation and resulting change in ownership of the property was communicated to the Bradstreet Commercial Agency at Duluth, and by it communicated to the Minneapolis agency of the same company in July, 1909. Defendant was a subscriber in the Bradstreet Company, and made inquiry thereof and received from its officers from time to time information of and concerning the financial standing of the copartnership prior to the issuance of the policy of the date December 8, 1909, and prior to the renewal thereof in December, 1910. The evidence tends to show in this connection that it has always been the uniform custom of the Bradstreet Agency whenever information comes to it of a change in the ownership of property, which involves the interests of its subscribers, promptly to communicate the fact to such subscribers. And the officer in charge of this branch of the agency work testified that he assumed and believed, though he had no positive knowl-

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edge on the subject, that the custom was followed in this instance, by the transmission to defendant of the information that the corporation had been organized by members of the firm, and had taken over the business and property covered by the insurance. Defendant's secretary testified that he had no recollection of receiving any such information and denied the same. But the matter was not of a recent occurrence, and in the volume of work imposed upon him, the receipt of the information may have been forgotten or mislaid, and it was for the jury to say whether in his denial he was or was not mistaken.

Other circumstances disclosed by the evidence strongly corroborate the claim that the notice was received, a recital or discussion of which will serve no useful purpose. Our conclusion on the evidence as a whole is that the question was properly submitted to the jury.

2. The question whether defendant waived the failure to pay the premium within the time prescribed by the contract does not require extended discussion. General Statutes 1913, § 3306, as well as the by-laws of the company, provide that the failure of payment of the premiums in insurance contracts of this kind within 60 days from the date of the policy shall void the same without notice or other act on the part of the company. The premium due for the renewal of the policy in question, which extended the insurance from December, 1910, to December, 1911, was not paid within the time stated in the statute, but was some 60 days overdue at the time of the fire. That there can be a waiver in such a case, notwithstanding the by-law and the statute, was settled by the case of Johnson v. Retail Merchants M. F. Ins. Co. 112 Minn. 418, 128 N. W. 462. It appears in the case at bar that each policy and renewal thereof extended the insurance for one year only, and there was therefore an annual premium to be paid. From the issuance of the first policy to the copartnership down to the date of the fire there was at no time a compliance with the contract in this respect, and the default in payment of the premium was in practically every instance from 60 to 90 days beyond the due date. Defendant had given encouragement to this method of payment by adopting the practice of sending a monthly statement of the premiums due, and of accepting them whenever remitted by the insured. In one instance only did the company take effective action to put an end to the continuous delays, and that was in July, 1910,

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when the policy was declared canceled and forfeited for the failure to pay the premium due in the preceding February. But notwithstanding that declaration, which was served upon the insured, a remittance made immediately following the cancelation was promptly accepted, the policy continued in force, and in December following renewed for another year. Thereafter defendant continued the practice of making monthly statements of the premiums due; one was sent to the insured on April 1, a few days before the fire. The premium was due in February. We are clear within our decisions in other like cases, that this conduct constituted a waiver of strict compliance with the contract and defendant cannot now be heard to invoke the statute or the by-law declaring a forfeiture for nonpayment; at least the evidence presented a question for the jury, and fully supports the verdict. Mueller v. Grand Grove U. A. O. D. 69 Minn. 236, 72 N. W. 48; Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728; Villmont v. Grand Grove U. A. O. D. 111 Minn. 201, 126 N. W. 730; Sauerwein v. Grand Lodge O. S. H. 121 Minn. 229, 141 N. W. 174; Dougherty v. Supreme Court I. O. F. 125 Minn. 142, 145 N. W. 813. In disposing of this feature of the case we have considered the conduct of defendant during the time the copartnership was the insured, as characterizing its conduct subsequent to the change of the relations between the parties by the formation of the corporation, and taken together there is shown a continuous waiver of the failure to make prompt payments. There was no error in the admission of the evidence tending to show such continuous waiver.

3. Defendant assigns as error several rulings in the admission of evidence. We have given each of these assignments careful attention with the result that no error of a substantial character is found; at least no error of sufficient consequence to justify a third trial of the action. Dunnell, Minn. Dig. 1916 Supp. § 7180.

Order affirmed.

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FRANK E. PEARSON v. UNITED STATES FIDELITY AND GUARANTY COMPANY.[1]

November 2, 1917.

No. 20,522.

Fidelity insurance — renewal construed as extension of bond.

1. Defendant, for a premium paid, issues bonds guaranteeing to employers the fidelity of employees. It so issued a bond to the bank represented by plaintiff, and, from time to time, gave written renewals thereof. It is *held* that the transactions did not constitute separate bonds. The effect of the renewals was merely to extend the time covered by the bond.

Same — conditions of insurance to be attached to bond.

2. Section 1616, R. L. 1905 (section 3292, G. S. 1913), is applicable to the bonds or guarantee contracts issued by defendant.

Judgment notwithstanding verdict denied.

3. Defendant was not entitled to judgment notwithstanding the verdict, on the ground that it conclusively appeared that the assured had failed to carry out the conditions of the bond.

Verdict — evidence — refusal to give requests.

4. The verdict is sustained by the evidence and is not contrary to the law as given by the court. The requests refused were not appropriate to the issues presented or else were so involved as to be of doubtful help to the jury.

No prejudicial error.

5. The record discloses no error prejudicial to defendant.

Action by the superintendent of banks of the state of Minnesota in the district court for Hennepin county to recover $10,000 upon defendant's bond to the Osseo State Bank of Osseo. The facts are stated in the opinion. The case was tried before Hale, J., who at the close of the testimony denied defendant's motion for a directed verdict on the ground that it conclusively appeared plaintiff had such notice of the defalcation as

[1]Reported in 164 N. W. 919.

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would require him to notify the surety, and not being notified by the surety defendant was released, and a jury which returned a verdict for the amount demanded. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Cray & Eaton, for appellant.

Lyndon A. Smith, Attorney General, *Harrington L. Schmitt,* Special Attorney General, and *Kerr, Fowler, Schmitt & Furber,* for respondent.

HOLT, J.

Defendant is a Maryland corporation engaged in the business of bonding or guaranteeing to employers the fidelity of their employees. In January, 1912, it issued its bond in the sum of $10,000 to the Osseo State Bank guaranteeing it for one year against pecuniary loss sustained by reason of the fraud or dishonesty of Joseph B. Thompson, its then assistant cashier. Each year thereafter the bond was continued in force by a renewal certificate, the last being dated January 2, 1915. In July, 1915, it was discovered that Thompson had embezzled large sums from the bank. The state superintendent of bands took charge of the institution, and, after ascertaining the situation, brought this action on the bond to recover for the defalcation. A verdict for the full amount was returned. Defendant moved in the alternative for judgment notwithstanding the verdict or a new trial. The motion was denied and defendant appealed.

The numerous errors assigned have been grouped and discussed by appellant under four or five propositions:

1. It is insisted that erroneous rulings were made because a wrong construction was placed on the bond. The learned trial court held, in effect, that the original bond with the renewals constituted one continuing obligation extending from January, 1912, until January, 1916. Defendant contends that the original bond and the several renewals are separate contracts, so that, under the provisions thereof, no liability could be asserted except for defalcations occurring subsequent to the last renewal. The question raised can hardly be said to go to the merits of this suit,

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for it is clear from the record that Thompson's defalcations subsequent to January 2, 1915, exceeded the penalty of the bond. But it is claimed that the construction placed by the court upon the contract allowed plaintiff to prove the extensive peculations of Thompson prior to January, 1915, thereby prejudicially affecting the jury upon the other issues of the case. The parts of the bond bearing upon the solution of the question now presented are these:

"That for the consideration of the premises the Company shall, during the term above mentioned or any subsequent renewal of such term, and subject to the conditions and provisions herein contained, at the expiration of three months next, after proof satisfactory to the Company, as hereinafter mentioned, make good and reimburse to the said Employer, such pecuniary loss as may be sustained by the Employer by reason of the fraud or dishonesty of the said Employee in connection with the duties of his office or position amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said Employee from the service of the Employer within the period of this Bond, whichever of these events shall first happen; the Company's total liability on account of said Employee under this Bond or any renewal thereof, not to exceed the sum of Ten Thousand Dollars. * * *

"That the Company, upon the execution of this Bond, shall not thereafter be responsible to the Employer, under any bond previously issued to the Employer on behalf of said Employee, and upon the issuance of any Bond subsequent hereto upon said Employee in favor of said Employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) Bond shall be in force at one time, unless otherwise stipulated between the Employer and the Company."

The last renewal reads as follows:

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CONTINUATION CERTIFICATE

Series 1015 Bank Department Amount $10000.00

Premium 25.00

United States Fidelity and Guaranty Company 5981,

Home Office, Baltimore, Md.

In consideration of the sum of twenty-five dollars the United States Fidelity and Guaranty Company hereby continues in force Bond 300,-420-12 in the sum of ten thousand dollars, on behalf of Joseph B. Thompson, cashier, in favor of Osseo State Bank, Osseo, Minn., for the period beginning the 2nd day of January, 1915, and ending on the 2nd day of January, 1916, subject to all the covenants and conditions of said original bond heretofore issued, dating from the 2nd day of January, 1912.

Provided, however, that the Company's liability on the original bond and all its renewals shall not exceed the penalty of the original bond.

Witness the signature of the president and assistant secretary, this 15th day of October, 1914.

John R. Bland,
President.

(Corporate Seal)

Wm.F.Morgan,
Assistant Secretary.

Authorities need not be cited to the well settled doctrine that indemnity contracts of this sort and the ordinary life or fire insurance policies are governed by the same rules of construction. Ambiguities therein are resolved in favor of the assured. The caption of the renewal instrument indicates a continuance or extension of an existing obligation. In the body of the writing, the instrument delivered January 2, 1912, is specifically continued in force with the provision that the defendant's "liability on the original and all its renewals shall not exceed the penalty of the original bond." It does not treat a renewal as equivalent to the issuance of a new bond. The reading of the last paragraph quoted above from the bond increases the ambiguity, for it speaks of the execution of separate bonds and makes the penalty named in the last bond so executed the limit of recovery. In the paragraphs first quoted only one bond is mentioned, and it does not speak of the renewal of the bond but concerning the renewal of the term or period during which the bond is to be in force. With the provisions for renewals without the formality of the execution of a new bond, with the last renewal certificate making the penal sum

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of the original bond the total insurance of all renewals, and with the equivocal position of the six-month clause, within which defalcation must be discovered if indemnity is to be had, we think the assured may well have concluded that there was at all times a continuous protection, so that for any defalcation during the whole period the company would respond if the defalcation was detected within six months after the relation of assured and assurer terminated, provided timely notice was given as required in the bond. We hold that the renewals had merely the effect of extending the term mentioned in the bond.

This is the construction placed upon like bonds of defendant and the renewals thereof in Green v. U. S. Fidelity & Guaranty Co. 135 Tenn. 117, 185 S. W. 726; U. S. Fidelity & G. Co. v. Citizens Nat. Bank, 147 Ky. 285, 143 S. W. 997; U. S. Fidelity & G. Co. v. Shepherd's Home Lodge No. 2, 163 Ky. 706, 174 S. W. 487; Rankin v. U. S. Fidelity & G. Co. 86 Oh. St. 267, 99 N. E. 314; Chatham Real Est. & Imp. Co. v. U. S. Fidelity & G. Co. 18 Ga. App. 588, 90 S. E. 88. A somewhat similar bond and renewal were construed as one contract in American Bonding Co. v. Morrow, 80 Ark. 49, 96 S. W. 613, 117 Am. St. 72.

There are authorities to the contrary: Gilmore & P. R. Co. v. U. S. Fidelity & G. Co. 208 Fed. 277, 125 C. C. A. 477; Proctor Coal Co. v. U. S. Fidelity & G. Co. (C. C.) 124 Fed. 424. The force of City of Brunswick v. Harvey, 114 Ga. 733, 40 S. E. 754, as an authority for appellant, is entirely destroyed by what is said by the court in Chatham Real Est. & Imp. Co. v. U. S. Fidelity & G. Co. supra.

In passing it may be said, that defendant, by paragraphs 8 and 9 in the answer, virtually admits the existence of but one single contract continuing from its inception in 1912 to and including the last renewal in 1915.

2. The next group of errors assigned is based upon the ruling that section 1616, Revised Laws of 1905 (section 3292, G. S. 1913), is applicable to this bond. This section reads:

"A statement in full of the conditions of insurance shall be incorporated in or attached to every policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except in so far as they are so incorporated or attached."

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Chapter 175, Laws 1895, p. 417, § 52, reads:

"In all insurance against loss by fire the conditions of insurance shall be stated in full, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy."

It is to be noticed that in the chapter mentioned, being a codification of the insurance law, section 27 (p. 403), thereof states under seven subdivisions the different purposes for which insurance companies may be formed to do business in this state, and the fourth subdivision is: "To guarantee the fidelity of persons in position of trust, private or public, and to act as surety on official bonds and for the performance of other obligations." Other provisions in the same chapter indicate that corporations engaged in the business of defendant come within its regulations and are to be regarded as insurance companies whether its contracts be known under the name of policies or bonds. With this definition of insurance companies it would have been plain that, had said section 52 read as does section 1616 in Revised Laws 1905 (section 3292, G. S. 1913), it would have applied to the bond here. But clearly the intention of the legislature of 1895 was to confine the provisions of said section 52 to insurance contracts. When the language so confining was deliberately dropped out in the revision of 1905 and the section placed in the insurance chapter under the "Provisions Common to all Companies," the inference is almost conclusive that the intention was to make the section applicable to all companies dealing in insurance as defined in the preceding section 1597, R. L. 1905 (section 3258, G. S. 1913). True, it has been held that the section in question does not apply to fraternal beneficiary associations (Louden v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425), but that conclusion was arrived at because of the fact that under sections 1687, 1695, 1703 and 1710, R. L. 1905, such corporations were excepted from the general provisions applicable to the ordinary life insurance companies which now unquestionably come within section 1616, R. L. 1905 (section 3292, G. S. 1913).

The instant case exemplifies the wisdom of the change. It is sought to bind the bank by certain promises of monthly examinations, by the directors, made in the application. The application is in the hands of the defendant. The bond or insurance was continued from year to year.

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Neither the original bond nor the renewals received by the bank disclose the contents of the application. If the officer or officers who made the application have been displaced, it is likely that the ones who succeeded knew nothing of the promises therein contained. The same reasons for requiring all the terms of the contract to appear upon the instrument itself exist in the case of the obligations issued by defendant as in the case of the ordinary fire or life insurance companies' contracts. Indeed, the indemnity written by defendant is in the nature of insurance under our decisions. Brandrup v. Empire State Surety Co. 111 Minn. 376, 127 N. W. 424; George A. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 128 N. W. 12, 33 L.R.A.(N.S.) 513; Standard Salt & Cement Co. v. National Surety Co. 134 Minn. 121, 158 N. W. 802.

That the section in question applies to ordinary insurance policies is beyond doubt. We hold it applicable to the contract or bond of defendant. A similar Iowa statute was similarly construed in U. S. Fidelity & G. Co. v. Egg Shippers S. B. & F. Co. 148 Fed. 353, 78 C. C. A. 345.

It follows that the promises or warranties made by the bank in the application cannot be considered as part of the contract, because not attached to or incorporated in the bond. Therefore the failure of the directors to make monthly examinations of the bank accounts or to pass upon the discounts or loans before the same were made could not avail as a defense. Nor do we think section 3300, G. S. 1913, makes the application admissible. It reads: "No oral or written misrepresentations made by the assured, or in his behalf, in the negotiation of insurance, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless made with the intent to deceive and defraud, or unless the matter misrepresented increases the risk of loss." There is nothing in the pleading or proof tending to show intent to deceive or defraud, or any misrepresentation of an existing fact. The promises in regard to future acts, if they could have been shown, might have become warranties in the contract. Hunt v. Fidelity & Casualty Co. 99 Fed. 242, 39 C. C. A. 496. But, under the pleadings and evidence received and offered, they could not be considered misrepresentations inducing the contract.

3. Defendant was not entitled to judgment notwithstanding the verdict. Whether the bank discovered any act of Thompson, giving rise

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to a claim under the bond, and failed to notify defendant thereof at the earliest practical moment, or whether, when the defalcation was discovered, such notice was given, or whether immediately, upon defendant's request, all the facts were laid before it, were questions of fact, properly submitted to the jury. It cannot be said as a matter of law that there was such delay or omission as to discharge defendant. The instructions of the court upon the issues of knowledge and notice are in accord with the decision in Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. ed. 1193, cited by appellant. That case also meets the contentions that there was here such negligence of the officers of the bank, in respect to the discovery of the defalcations, as to amount to bad faith or a discharge of the bond. Defendant knew when it executed the bond that the obligee was a small country bank and that Thompson and one other person alone transacted its business. The directors and officers of such an institution are not, as a rule, expert bookkeepers. The record conveys a strong impression of diligence and faithful attempt on the part of all officers connected with this bank, except Thompson, to perform their full duty. When the repeated examinations of experts from the office of the state superintendent of banks failed to detect any misappropriation, is it reasonable to insist that the farmers and merchants who composed the directorate of this bank should have done so or be charged with gross negligence?

4. The verdict is claimed to be against the law and the evidence. An unprejudiced examination of the record will convince any reasonable person that there is ample evidence to sustain the verdict, and that it is not contrary to the law as given to the jury. The instructions given presented the issues in a clear and terse manner, and adequately covered all the phases of law applicable thereto. We discover therein no error that could have prejudiced the defense. The charge is not open to the criticism that it is argumentative. Numerous and lengthy instructions were requested and refused. Most of these contain correct abstract propositions of law, but, under the evidence, would be of doubtful propriety, and likely more confusing than helpful to a jury. The general objection to the refused requests is that the duties and responsibilities of the directors to the bank or to bank creditors was sought to be made the deter-

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mining factor in this lawsuit instead of the obligation of defendant under the bond in suit.

5. It is impossible to attach any importance to the manner in which the proof of loss was addressed. It arrived at the proper destination and was acted upon by defendant. The misunderstanding between court and counsel as to the latter's reading of the paragraph of the bond wherein a certain word occurred seems not to be worthy of comment. In no view could the incident have helped or harmed either litigant.

We find no error.

The order is affirmed.

NATHAN LOWENTHAL AND ANOTHER v. R. H. NEWLON.[1]

November 2, 1917.

No. 20,531.

Construction of lease — lessor's option to terminate lease not available to lessee.

1. A provision in a lease that upon default for 60 days by the lessee in payment of rent, the lease shall become ended and determined, gives an option of termination to the lessor, which he may avail himself of or waive, as he sees fit. It does not give the lessee the right to secure a termination of the lease by his own default.

Pleading — surrender of premises — answer defective.

2. The answer contains no sufficient allegation of acceptance by the lessors of surrender of the premises.

Action in the district court for Hennepin county to recover $150 for rent. From an order, Fish, J., sustaining plaintiff's demurrer to the answer, defendant appealed. Affirmed.

R. L. Penney, for appellant.

Joss & Ohman, for respondents.

[1]Reported in 164 N. W. 905.

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HALLAM, J.

1. This action is brought to recover rent due May 1, 1916, under a lease dated May 8, 1913, and running for a term of five years. Defendant agreed to pay rent for that term quarterly in advance. The lease provides that if the lessee shall make default for 60 days in the payment of rent when due, or in the performance of any of the covenants or agreements on his part to be performed, "then and from thenceforth this lease shall become ended and determined," and all rights of the lessee shall be forfeited and lapse, as fully as if the lease had expired by lapse of time, and the lessors shall at once have all the right of re-entry upon the premises which they would have upon expiration of the lease by lapse of time, and the lessee shall thereupon surrender the premises to the lessor. The answer alleged as a defense that defendant had defaulted in the payment of rent for more than 60 days before May 1, and had notified the lessors that he declared the lease ended because of his own default, and that all liability for payment of rent was thereupon ended.

Plaintiff demurred to this answer and the demurrer was sustained. We think the demurrer was properly sustained.

The claim of defendant is, that by his own default he could terminate his liability under the lease. Such a construction of the language of the lease cannot be sustained. The lease imposed on the lessee a real obligation to pay rent during the term. To construe the language quoted as giving him an option to end the lease because of his own default would nullify this obligation. All the provisions of the lease should be harmonized and given effect, if possible. We think they may be. Taking all the terms of the lease together, it is clear that the provision on which defendant relies was inserted for the benefit of the lessor and that he may avail himself of it or waive it, as he sees fit. This rule is reasonable and just, and it is in harmony with the decision of this court in Hanley Falls Creamery Co. v. Milton Dairy Co. 126 Minn. 226, 148 N. W. 46, 52 L. R.A.(N.S.) 718. It is also in harmony with modern authority elsewhere. Provisions of this and similar character are construed as waivable options or conditions and not as absolute limitations upon the term. 2 Tiffany, Landlord & Tenant, § 194d; Trask v. Wheeler, 7 Allen (Mass.) 109; Ray v. West Pennsylvania N. Gas Co. 138 Pa. St. 576, 20 Atl. 1065, 12 L.R.A. 290, 21 Am. St. 922; 16 R. C. L. 1100, 1101. In some earlier

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cases in England, defendant's contention was adopted, but it was soon realized that such a construction permitted the lessee to take advantage of his own wrong and thus escape liability on a burdensome lease, and the rule was abandoned as unpractical and unjust. Hanley Falls Creamery Co. v. Milton Dairy Co. 126 Minn. 226, 227, 148 N. W. 46, 52 L.R.A. (N.S.) 718; 16 R. C. L. 1118, 1119. So far as we know, the rule is not now adhered to anywhere, and we think it should not be.

2. There is an allegation in the answer that upon giving the notice above mentioned, defendant "did then and thereby surrender to said plaintiffs all buildings and improvements on said described estate." Defendant now contends that this signifies a surrender of the leased premises by defendant and acceptance of the surrender by plaintiffs. There is probably no sufficient allegation of a surrender of the leased premises by defendant. There is surely no allegation at all of acceptance of such surrender by plaintiffs.

Order affirmed.

STATE EX REL. LENA RAU v. DISTRICT COURT OF RAMSEY COUNTY AND ANOTHER.[1]

November 2, 1917.

No. 20,535.

Workmen's Compensation Act — sunstroke.

1. Sunstroke is a personal injury caused by accident within the meaning of the Workmen's Compensation Act.

Same — accident arising out of employment.

2. Where the work and the condition of the place where it is carried on expose the employee to the happening of an event causing the accident, there is no longer a risk to which all are exposed, and the result is an accident arising out of the employment.

[1]Reported in 164 N. W. 916.

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Upon the relation of Lena Rau the supreme court granted its writ of certiorari directed to the district court for Ramsey county, the Honorable Grier M. Orr, one of the judges thereof, and the city of St. Paul, to review the proceedings in that court under the Workmen's Compensation Act brought by relator, as widow of decedent employee, against respondent city, as employer. Reversed.

Kueffner & Marks, for relator.

O. H. O'Neill and *W. J. Giberson,* for respondent.

QUINN, J.

Certiorari to review a judgment of the district court of Ramsey county, denying compensation, under the Workmen's Compensation Act, to the relator, Lena Rau, widow of the decedent George Rau, who was an employee of the respondent city.

For a number of years George Rau had been employed by the city of St. Paul, doing manual labor on its streets at $2 a day, under the direction of a foreman, during which time he and the defendant were bound by and subject to the provisions of part 2 of chapter 467, p. 677, Laws of Minnesota for 1913, and amendments thereto. On July 1, 1916, while so employed, he was working on East Robie street. The day was hot. He was working in the open with no protection from the rays of the sun. The street was sandy. It had rained the night before and the sand was moist. During the early part of the afternoon decedent and his fellow workmen rested for a time in the shade near by. They resumed work at about 3 o'clock. Shortly thereafter Rau was at work near the middle of the street. A workman saw him stagger and went to his assistance. The foreman gave him a drink of water and then took him to the hospital, arriving there at about 4:30. Rau was in an unconscious condition, temperature 110; pulse 110. He regained consciousness at about 11 o'clock that evening. The doctor in charge stated that Rau was suffering from sunstroke. On the following day he was conscious and took liquid diet. He left the hospital on the afternoon of the third; on the fourth Dr. Endress was called to the Rau home and found Rau's temperature 102 and pulse 100. On the fifth he was improved, but died on the morning of the seventh. The trial court found that the cause of death was sunstroke.

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The record contains none of the testimony offered upon the trial, and the case must be considered solely upon the findings of the trial court and determined upon deductions therefrom.

The question here for determination is: Did Rau come to his death by accident arising out of and in the course of his employment, within the meaning of the compensation act? If he did, then the relator is entitled to recover compensation, and the judgment of the district court should be reversed; otherwise, affirmed.

The term "accident" as used in the compensation act and as therein defined shall "be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time, injury to the physical structure of the body." G. S. 1913, § 8230.

The first inquiry is: What is sunstroke? It is stated, in effect, in Hare's Practice of Medicine, 1915, that sunstroke, more properly called heat-stroke, is a condition of the body produced by great heat; that the chief factor is the presence of great heat associated, as a rule, with marked humidity and physical exertion, and that heat-stroke may occur at night as well as day, provided the atmosphere is hot and moist. Webster's New International Dictionary defines sunstroke as "an affection, often fatal, due to exposure to the sun or excessive heat and marked by sudden prostration, with symptoms like those of apoplexy." The Encyclopedia Americana article on the subject begins: "Sunstroke, prostration due to exposure to intense external heat. Such exposure may be to the direct or indirect rays of a tropical sun or to the excessive heat of an engine room. In either case heat and physical exertion combine to bring about the results. A high degree of humidity of the atmosphere is one of the most important features since this hinders free evaporation from the body."

The conditions surrounding decedent at the time of his injury exposed him to an unusual danger different from that to which the masses engaged in like employment were subjected. It had rained the night before, the sand was wet, the sun's rays direct, thereby enhancing liability to sunstroke. Decedent was exposed to the direct rays of the sun in addition to the humid atmosphere emanating from the wet street.

That the injury was sustained in the course of the employment is not

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denied; that it was an "unexpected or unforeseen event" is not questioned, and we have no difficulty in arriving at the conclusion that it was an event "producing at the time injury to the physical structure of the body," "happening suddenly and violently." It is undisputed that the day was extremely hot. The men had rested for three-quarters of an hour in the shade and had returned to their labor. Decedent was at work near the middle of the street when, all at once, he was seen to stagger. He had been overcome, had suffered a sunstroke. This was a violent injury produced by an external power, not natural. The foreman came to his assistance, gave him a drink of water and immediately removed him to a hospital where his temperature was found to be 110 and pulse 110. He was unconscious and remained in that state until 11 o'clock that evening. The intense heat of the sun, associated with the humidity of the atmosphere emanating from the wet sand, as an external cause, was a violent agency in the sense that it worked upon decedent so as to cause his injury and death. The conclusion that his death was caused by violent and external means is inevitable. That a death is unnatural imports a violent agency as the cause. Paul v. Travelers' Ins. Co. 112 N. Y. 472, 20 N.E. 347, 3 L.R.A. 443, 8 Am. St. 758; Pickett v. Pacific Mid. Life Ins. Co. 144 Pa. St. 79, 22 Atl. 871, 13 L.R.A. 661, 27 Am. St. 618.

In the cases of Ismay, Imrie & Co. v. Williamson (1908) A. C. 437, 439-441, Morgan v. S. S. "Zenaida," 2 B. W. C. C. 19, and Davies v. Gillespie, 5 B. W. C. C. 64, death by heat-stroke was held to be an accident within the meaning of the Workmen's Compensation Act. In the Ismay case a workman, in a weak and emaciated condition, while raking ashes from under the boiler in a stokehole of a steamship, received a heat-stroke from the effect of which he died. In affirming a recovery in that case, Lord Loreburn stated:

"To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who has died from a heat-stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not. * * * In my view this man died from an accident. What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted

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by precautions which experience, in this instance, had not taught. It was an unlooked for mishap in the course of his employment. In common language it was a case of accidental death."

Concurring in this opinion, Lord Ashbourne remarked:

"Was this an accident arising out of and in the course of his employment? With great deference to those who hold a contrary opinion, I can myself see no room for serious doubt on the subject. Everything was in the course of his employment and arising out of it. But for the boiler and the heat-stroke, and the speedy exhaustion it caused, there would have been no accident. * * * Although a heat-stroke may be called a disease, it is in this case, in my opinion, a disease directly caused by an accident arising out of or in the course of an employment, particularly dangerous to Williamson, in consequence of his weak state of health."

In the Morgan case the workman was engaged as an ordinary seaman on board the steamship Zenaida, while the ship was at port off the Mexican coast. He was ordered to go over the side to paint the vessel. The heat was excessive, he was seized with sunstroke and his health was impaired. The trial court was of the opinion that he was suffering from an accident which arose out of and in the course of his employment, and awarded compensation. Upon review the award was sustained, it being held that the case was governed by the decision in the Ismay case.

There is a marked contrast between the sudden and violent effect of a sunstroke and the drinking of water infected with typhoid germs, as it requires days of time after the infection for the disease to develop, as held in State v. District Court of Rice County, supra, page 211, 164 N. W. 810.

Where the work and the conditions of the place where it is carried on expose the employee to the happening of an event causing the accident, there is no longer a risk to which all are exposed, and the result is an accident arising out of the employment. Andrew v. Failsworth Ind. Society, 20 Times L. R. 429; State v. District Court, supra, page 131, 164 N. W. 585, and cases cited. Was decedent exposed to something more than the normal risk to which men, in general, engaged in manual labor upon the streets are subjected in hot weather? If he was, then he was exposed to an extra danger arising out of his employment, and, if that contributed to the accident, then the accident arose out of the employment. We are of the opinion that there was a substantial abnormally

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increased risk owing to the character of the street coupled with its moist condition, which contributed to the cause of the accident.

Reversed and remanded for further proceedings in accordance with the views herein expressed.

JOHN P. GALBRAITH v. A. CLARK AND OTHERS.[1]

November 2, 1917.

No. 20,570.

Promissory note — failure of consideration — evidence insufficient.

This action was to recover on promissory notes executed by defendants to the Farmers Elevator Company of Barry. The only defense submitted to the jury was want or failure of consideration. Defendants pleaded and proved that they were farmers in the vicinity and as such interested in the operation and maintenance of the elevator as a market for their wheat; that the notes were given to provide the elevator company with funds to continue in business; that the agent who solicited the notes stated that the indebtedness of the company was about $700, whereas it was many times that sum; that it was agreed that, if enough was not raised to clear up the indebtedness of the company, defendants' notes would be returned to them. The cash and notes raised, while not sufficient to pay the indebtedness of the elevator company, enabled it to resume operations and continue in business for three years, when it went into the hands of plaintiff as receiver. It is *held* that the evidence did not justify a finding that there was a want or failure of consideration for the notes.

Four actions in the municipal court of Ortonville by the receiver of the Farmers Elevator Company of Barry to recover $25 upon a promissory note. The substance of the answers is given in the second paragraph of the opinion. The cases were tried together before Flaherty, J., who at the close of the testimony denied the motions of defendants for a directed verdict in favor of each defendant, and the motion of plaintiff for a directed verdict in his favor, and a jury which returned a verdict in favor of

[1]Reported in 164 N. W. 902.

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defendant in each action. From an order denying his motion for judgments notwithstanding the verdict or for new trials, plaintiff appealed. Reversed.

Cliff & Purcell, for appellant.

Kaercher & Freerks, for respondents.

BUNN, J.

These four actions were tried together in the court below. The jury returned verdicts for the defendants. Plaintiff moved for judgment notwithstanding the verdict or for a new trial in each case. The motion was denied and plaintiff appeals.

Each action was brought by plaintiff, as receiver of the Farmers Elevator Company, of Barry, a corporation, to recover of defendant therein the sum of $25 and interest on a promissory note executed by the defendant to the elevator company. The answers were the same in each case. Each alleged that the defendant, at the time the note was executed, was a resident of Big Stone county in the vicinity of Barry, where the elevator company was located, engaged in farming; that it was necessary for him to market his grain at Barry, and that he was interested in the maintenance and operation of the elevator company at Barry; that "in pursuance of his interests and for the purpose of aiding in the establishment and maintenance of the same during the year 1909, he voluntarily paid and contributed for such purpose to the McBrady, hereinafter mentioned, for said Farmers Elevator Company, the sum of $25.00." The answer then admits the execution and delivery of the note sued on, but alleges that the note was given without consideration other than hereafter stated; that the note was given to the elevator company through one McBrady, its manager, upon the express condition "that sufficient money should be raised otherwise from other sources, which, together with the amount of said note should be sufficient and should be used for the payment in full of all indebtedness of whatever nature existing against said corporation, and that in case sufficient funds were not so raised, then said note should be canceled and returned to defendant." It is then alleged that in fact an indebtedness of about $7,500 then existed against the elevator company, whereas McBrady stated that the indebtedness totaled about $750. It is further alleged that the money raised and notes given were wholly

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insufficient to pay the indebtedness or to comply with the condition upon which the note was given. It is alleged that McBrady knew the actual amount of the indebtedness, that defendant did not, that McBrady stated it was about $750 to induce defendant to give the note, "with others to give like notes."

We have thus stated in some detail the allegations of the answers in order to make clear, if possible, the exact issues raised. The pleader seems to have had in mind three defenses: (1) Want of consideration; (2) a conditional delivery of the note, under the doctrine of Westman v. Krumweide, 30 Minn. 313, 15 N. W. 255, and succeeding cases; (3) fraud.

The facts, including those admitted or proved, and those which the evidence tended to establish, considered from the standpoint of defendants, are as follows: In the fall of 1908 the elevator company was in financial difficulties. Pursuant to a resolution of its board of directors, McBrady, the manager, went among the stockholders and the farmers in the vicinity to raise funds to carry on the business. Defendants Winter and Stotesbery were stockholders in the company, defendants Clark and Kirkey, farmers interested in the maintenance of the elevator as a market for their wheat. This was also the case with the defendant stockholders. McBrady succeeded in raising some $1,200 in cash and notes; this was turned over to the elevator company, and it was thereby enabled to resume operations. It remained a going concern for about three years, when it was forced to suspend. The evidence would warrant a finding that McBrady stated to each defendant at the time he requested his note that the total indebtedness of the company did not exceed $700, and that each defendant gave his note upon the condition that, if enough was not raised to wipe out the debts of the company, the note would be returned to him. As a matter of fact the elevator company was indebted at this time in a sum in excess of $7,000.

The only defense submitted to the jury was want or failure of consideration. The defense of fraud was not mentioned, and the contention that the notes were executed and delivered on condition that the amount raised would wipe out the debt of the company, or "clear the house," was not submitted as a defense in itself. The court told the jury more than once that unless they found there was no consideration for the notes,

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and that they were executed and delivered upon the condition stated, plaintiff was entitled to recover. The evidence as to the condition seems to have been received only as bearing upon the question of consideration. We think it was admissible on this theory, if it had a reasonable tendency to show want or failure of consideration. Whether it was admissible under the so-called "conditional delivery" doctrine applied in so many of our cases from Westman v. Krumweide, supra, to S. P. Bowser & Co. v. Fountain, 128 Minn. 198, 150 N. W. 795, L.R.A. 1916B, 1036, may be open to doubt. The question, in view of the trial court's charge, is not before us.

The only question we need to consider is whether the evidence justified a finding that these notes were without consideration, or that the consideration had failed. The situation is slightly different as to the two defendants who were stockholders, but it seems to us, leaving out of consideration for the present the alleged condition and its violation, that there was a good and sufficient consideration as to all of the defendants. Each answer admits that the defendant, as a farmer in the vicinity, was interested in the continuation of the elevator at Barry, and each defendant admits this in his evidence. It was a distinct advantage to each to be able to market his grain at Barry. We fail to see why this was not a sufficient consideration for the notes. Under the rule that it is a sufficient consideration for a note if any advantage or benefit results to the maker or any detriment or injury to the other party, it seems plain to us that the consideration was sufficient as to each of the defendants. Albert Lea College v. Brown, 88 Minn. 524, 93 N. W. 672, 60 L.R.A. 870, 1 Dunnell, Minn. Dig. § 1750, and Dunnell, Minn. Dig. 1916 Supp. § 1750, et seq.

It remains to be determined how the agreement testified to by defendants affects the question of consideration. We are obliged to assume the truth of the testimony of the defendants as to McBrady's statement as to the amount of the indebtedness and as to the agreement that the notes should be returned if enough was not raised to pay this indebtedness. It is proper to note, however, that what the company was in need of at the time was funds with which to buy grain and continue the business. In view of this fact, and the allegations of the answers to the effect that the notes were given "for the purpose of aiding in the estab-

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lishment and maintenance" of the elevator during the year 1909, McBrady's version of the subscriptions may be the true one, but the evidence of the defendants and their witnessess is too clear and positive to permit our saying that the jury was not justified in accepting it as true. But does this evidence show a total lack or entire failure of consideration? It seems to us that it does not. The consideration moving to the defendants was not that the elevator company should be free of debt, but that it should open up again and continue to buy grain. It did this, operating for three years. It seems to us that this fact is conclusive against the theory that there was an entire lack or failure of consideration. That the advantage to the defendants was not so great as it might have been had the company been out of debt is not material so long as some advantage or benefit remained.

It is not a case for judgment absolute for the plaintiff. We are unable to say that defendants may not have good defenses, if properly pleaded and proved. All we hold is that the defense of want or failure of consideration is not sustained by the evidence. As this was the only defense submitted to the jury, the verdict cannot stand. As we cannot declare the other defenses, not submitted, to be without merit, the result is necessarily a new trial, not judgment absolute.

It is proper to mention the claim of plaintiff that defendants are estopped from defending against the notes. We do not think that the evidence received was sufficient to conclusively show estoppel. This issue is in the case, however, and, if competent evidence is offered thereon at the new trial, it should be received.

Order reversed and new trial granted. No statutory costs will be allowed on this appeal.

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STATE EX REL. C. N. NELSON v. DISTRICT COURT OF RAMSEY COUNTY AND OTHERS.[1]

November 2, 1917.

No. 20,662.

Workmen's Compensation Act — freezing an accident arising from employment.

The evidence is *held* to sustain a finding that the injury to the relator, a janitor, who was frozen in severely cold weather while shoveling snow from the sidewalks about a building, was an accidental injury arising out of his employment within the Workmen's Compensation Act.

Upon the relation of C. N. Nelson the supreme court granted its writ of certiorari directed to the district court of Ramsey county, the Honorable Charles C. Haupt, one of the judges thereof, and the Northwestern Telephone Exchange Company, to review the proceedings in the latter court under the Workmen's Compensation Act brought by relator, as employee, against respondent company, as employer. Reversed.

John I. Levin, for relator.

E. A. Prendergast, for respondent.

DIBELL, C.

Certiorari to the Ramsey county district court to review a judgment denying the relator compensation under the Workmen's Compensation Act.

The relator was employed by the Northwestern Telephone Exchange Company. While so employed he froze his big toe and the freezing resulted in the amputation of his leg. The injury was sustained in the course of his employment. The court found that the freezing was not an accident. It found that it arose out of his employment. Since the trial we have held that freezing is an accident. State v. District Court of St. Louis County, supra, page 131, 164 N. W. 585. If the finding that the freezing arose out of his employment within the meaning of the com-

[1]Reported in 164 N. W. 917.

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pensation act (G. S. 1913, § 8195), is sustained, the relator should have compensation and the judgment should be reversed; otherwise he should not and there should be an affirmance.

The relator was a janitor employed by the telephone company at its midway exchange in Merriam Park. His duties were the usual ones of a janitor. Using his language he was "required to keep the building clean, keep the fire going, shovel the snow off the sidewalk whatever time it was necessary—all such things that belong to a janitor to do." On February 22, 1916, he went to the building about 5 o'clock in the morning, attended to the fires, did some other little things about the building, and then started to shovel the snow from the sidewalks. There had been a heavy fall the night before. He had to shovel a 50 foot front and 140 feet back to the alley. The snow was two or two and a half feet deep. The weather was very cold. The work of shoveling required perhaps one and a half hours. While doing the work he went from time to time into the building to see to the fires and could go at any time he chose. These are the important facts.

In State v. District Court of St. Louis County, supra, page 131, 164 N. W. 585, we held that the finding of the court that the freezing there involved arose out of the employment was sustained by the evidence. The workman was employed in the northern woods swamping, was several miles from camp, had no facilities for warming or protecting himself, and was peculiarly exposed to severely cold weather. The question whether the trial court's finding was sustained was not difficult. The one presented by the record before us is. The direct authorities upholding findings in freezing cases are few. We cite those called to our attention. McManaman's Case, 224 Mass. 554, 113 N. E. 287 (stevedore unloading a steamer; exposed to greater cold than that to which one working in the open is ordinarily exposed; not at liberty to stop work to protect himself); Day v. S. Trimmer & Sons, 176 App. Div. 124, 162 N. Y. Supp. 603, 604 (workman unloading coal from delivery wagon and carrying into houses of customers; coal wet and weather severely cold); Larke v. John Hancock Mut. Life Ins. Co. 90 Conn. 303, 310, 311, 97 Atl. 320, L.R.A. 1916E, 584 (insurance solicitor and collector required to travel in the open weather 15 or 20 miles in very cold weather; made numerous calls; went in and out of heated houses); Canada Cement Co. v. Pazuk,

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22 Quebec K. B. 432, 433, 12 D. L. R. 303, 7 N. C. C. A. 982 (employee working at the bottom of a quarry pit in intense cold for long hours). In the Massachusetts case the court concluded that the finding that the workman was exposed to "materially greater danger and likelihood of getting frozen than the ordinary person or outdoor worker," was sustained. In the New York case the court said that the industrial commission "was fully justified in finding from the evidence that the claimant, by reason of his employment in handling wet coal in the storm, was specially affected by the severity of the weather." The Connecticut case was, in the view of the court, "a clear case of an employee injured as a result of a greater exposure to the elements than persons in that locality are ordinarily subjected." In the Quebec case the court in the course of an extended discussion said:

"Thus, as a general principle, the employer is not responsible for damages caused to his workmen by lightning, storms, sunstroke, freezing, earthquakes, floods, etc. These are considered as 'force majesture,' which human vigilance and industry can neither foresee nor prevent. The victim must bear alone such burden, inasmuch as human industry has nothing to do with it and inasmuch as the employee is no more subject thereto than any other person. * * * Every human being is liable to suffer from events in which he has no share of responsibility. There is here between the accident and the employment no relationship of cause and effect. Hence it cannot be said of such an accident that it arises out of or in the course of employment. But where the work, or where the conditions under which it is carried on, expose the employees to the happening of a force majeure event, or contribute to bring it into play or to aggravate its effects, then we are no longer face to face with the sole forces of nature. This is no longer a risk to which everybody is exposed; this is a danger which threatens more particularly the employees who work under special conditions. Hence the occurring of a force majeure event under such circumstances is an accident arising out of the employment."

There are two cases in which findings that the freezing did not arise out of the employment were sustained. Warner v. Couchman [1912] A. C. 35, affirming [1911] 1 K. B. 351, 353 (journeyman baker delivering bread from his cart; weather cold and stormy; hands exposed to

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weather); Karemaker v. S. S. Corsican, 4 B. W. C. C. 295, 297 (seaman at work on his ship in harbor; handling frozen ropes; weather very cold but not abnormally so).

In the first the finding of the county court that the workman was not exposed to more than the ordinary risk of those working in the open was sustained; and the court of appeal was "unable to see that there was any peculiar danger to which the applicant was exposed, beyond that to which that large section of population who are drivers of vehicles, or who are otherwise engaged as out-of-door laborers, are exposed." Emphasis was placed upon the thought that the question was one of fact. In the other the finding of the county court was sustained with the suggestion that "the liability to frost-bite is one of the normal incidents to which everybody is subjected by reason of the severity of the climate." We find no other freezing cases.

Cases involving sunstrokes or heat strokes present a similar question. They are the subject of review in State v. District Court of Ramsey County, supra, page 250, 164 N. W. 916, a heat stroke case, where the evidence is held such as to authorize a finding that the injury arose out of the employment. And we have held that the character of an employee's work may so expose him to the risk of injury by lightning that a finding of a causal connection is sustained. State v. District Court of Ramsey County, 129 Minn. 502, 153 N. W. 119, L.R.A. 1916A, 344.

The trial court was justified in finding that to an appreciable extent the relator was more exposed to the risk of injury from freezing than the generality of workers and that the added risk was because of the character of his employment. The causal test of the law is satisfied; and without prolonging the discussion we hold that the relator's work so exposed him to freezing that the finding that it arose out of his employment is sustained.

Judgment reversed.

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SELMA C. BRUCE v. T. I. RYAN.[1]

November 9, 1917.

No. 20,480.

Motor vehicle law does not abrogate traffic ordinance.

1. The provision of the Minneapolis traffic ordinance that vehicles upon certain designated streets shall have the right of way, at street intersections, over vehicles upon the intersecting streets, is not abrogated by the motor vehicle law.

Collision at street intersection — ruling of court prejudicial.

2. Plaintiff brought suit for injuries sustained in a collision at a street intersection between defendant's automobile and the automobile in which she was riding. The ordinance gave the right of way at this intersection to vehicles upon the street along which defendant was proceeding. The court ruled that the ordinance had been abrogated. *Held* prejudicial error.

Action in the district court for Hennepin county to recover $2,550 for injuries received by plaintiff in a collision between an automobile owned and driven by her husband and defendant's car. Among other matters, the answer set up the traffic ordinance of the city of Minneapolis referred to in the second paragraph of the opinion, and alleged that the automobile in which plaintiff was riding was proceeding at an excessive rate of speed so as to endanger the property of persons using the highways mentioned in the pleadings; that the automobile in which plaintiff was riding, without any warning, shot immediately in front of defendant's automobile, so that it was impossible for defendant's automobile to come to a stop before reaching the point of said collision, or to avoid the automobile in which plaintiff was riding. The case was tried before Leary, J., and a jury which returned a verdict for $1,000. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

Swan, Stinchfield & Richards, for appellant.

Selover, Schultz & Selover, for respondent.

[1]Reported in 164 N. W. 982.

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TAYLOR, C.

Plaintiff recovered a verdict for injuries sustained in a collision between two automobiles at a street intersection in the city of Minneapolis, and defendant appealed from an order denying his alternative motion for judgment or for a new trial.

Franklin avenue runs in an east and west direction and is crossed at right angles by Third avenue south. Plaintiff was traveling west along the north side of Franklin avenue in an automobile owned and driven by her husband; and defendant was traveling south along the west side of Third avenue in an automobile owned by him and driven by his son. The two machines reached the intersection of the streets at nearly the same time and a collision occurred. At the trial, defendant offered in evidence an ordinance of the city of Minneapolis giving vehicles driven along Third avenue the right of way at street intersections over those driven along the intersecting streets. The court refused to admit the ordinance in evidence on the ground that it had been annulled by the motor vehicle law. Whether this ruling was erroneous; and, if so, whether it was prejudicial to defendant, are the only questions presented.

Plaintiff contends: (1) That the motor vehicle law abrogated this provision of the ordinance, and that the ruling was correct; (2) that even if this provision of the ordinance had not been abrogated, it did not apply in the instant case for the reason that her husband's car reached the crossing sufficiently in advance of defendant's car to be entitled to the right of way notwithstanding the ordinance; and (3) that she was merely a passenger, and, if her husband was negligent in failing to yield the right of way, his negligence is not imputable to her.

The motor vehicle law (G. S. 1913, § 2637), annuls all city and village ordinances regulating or limiting the use or speed of motor vehicles, and undoubtedly abrogates all other municipal regulations which are inconsistent with it. But the ordinance here in question is a general traffic regulation governing the movement of all vehicles at street intersections, and is designed to facilitate the use of the streets and prevent accidents. It applies indiscriminately to all vehicles without regard to the motive power by which they are propelled, and merely gives to those proceeding along certain streets the right of way at street intersections over those proceeding along the intersecting streets. When travelers upon

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intersecting streets approach the point of intersection so nearly at the same time that one must give precedence to the other, it points out which one shall yield the right of way, and which one may proceed. It is merely a traffic regulation, and not a regulation restricting the use of motor vehicles within the meaning of the statute. The city possessed the power to make and enforce this regulation, unless such power has been taken from it by the statute. State v. Larrabee, 104 Minn. 37, 115 N. W. 948. If the statute had provided that at street intersections travelers upon one of the intersecting streets should have the right of way over those upon the other, the statute would doubtless supersede the ordinance, but the statute in question contains no such provision. It establishes certain road rules, but contains no provision determining the respective rights of travelers at street intersections. As the statute established no rule which applies to the situation provided for by the ordinance, we are of opinion that this provision of the ordinance is still in force. Freeman v. Green (Mo. App.) 186 S. W. 1166; Hiscock v. Phinney, 81 Wash. 117, 142 Pac. 461; City of Oshkosh v. Campbell, 151 Wis. 567, 139 N. W. 316; Park v. City of Duluth, 134 Minn. 296, 159 N. W. 627; Evans v. City of Redwood Falls, 103 Minn. 314, 115 N. W. 200.

2. The evidence is not conclusive that the car in which plaintiff was riding reached the street intersection appreciably in advance of defendant's car. There was testimony to that effect on the part of plaintiff, but there was also testimony to the contrary on the part of defendant. The question was for the jury.

3. It is true that plaintiff is not chargeable with the contributory negligence of her husband; and, if the ordinance bore only upon the question as to whether he had been negligent, its exclusion was without prejudice. But the primary question was whether defendant's son had been negligent in driving defendant's car, and this might depend upon whether he was or was not entitled to the right of way. If he was entitled to the right of way, an attempt to cross the intersection might not be an act of negligence under circumstances which would make it an act of negligence if he was not entitled to the right of way. The rule giving the right of way to vehicles on Third avenue should have been taken into consideration

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in determining whether he was chargeable with negligence, and its exclusion was prejudicial.

Order reversed and a new trial granted.

JULIA GORGENSON v. GREAT NORTHERN RAILWAY COMPANY.[1]

November 9, 1917.

No. 20,494.

Judgment notwithstanding verdict — evidence of negligence insufficient.

In a personal injury suit the evidence is *held* insufficient to sustain a verdict for the plaintiff, and the trial court rightly granted judgment notwithstanding the verdict.

Action in the district court for Yellow Medicine county by the administratrix of the estate of William A. Gorgenson, deceased, to recover $50,000 for the death of her intestate. The answer alleged that the work in which decedent was engaged involved certain dangers which were incidental to his work as brakeman, that he appreciated and assumed the risks thereof, specifically the dangers connected with the backing up of the train which caused his injuries and death. The case was tried before Daly, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for $10,250. Defendant's motion for judgment notwithstanding the verdict was granted. From a judgment in favor of defendant, plaintiff appealed. Affirmed.

Tom Davis and *Ernest A. Michel,* for appellant.

M. L. Countryman and *A. L. Janes,* for respondent.

PER CURIAM.

The plaintiff appeals from the judgment entered upon the order granting the defendant's motion for judgment notwithstanding after verdict in favor of the plaintiff in a personal injury suit.

[1]Reported in 164 N. W. 904.

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The plaintiff's intestate William A. Gorgenson was the rear brakeman on a freight train of the defendant. The train reached Litchfield going west at 6:40 in the evening of April 16, 1916. It was cut in two, left on the main track and the engine started switching. It was the duty of Gorgenson to protect the rear of the train. This means that it was his duty to go back and warn approaching trains, using flags, torpedoes or fusees as occasion might require, and put a red light on the rear of the train. The rule required the placing of the red light at sunset, which at this time was 6:39, but in practice it was not unusual to exercise some discretion. The engine finished its switching at 7:50 and backed and coupled onto the rear part of the train. In doing this the standing cars were pushed back some 20 or 30 feet rather violently and deceased was run over and killed.

It is not affirmatively shown that Gorgenson did not go back to the east to warn oncoming trains nor does it affirmatively appear that he did. The fact is of importance only as it bears upon the question whether the trainmen should have supposed him to be at the rear of the train where he might be hurt by its movement. There is evidence that for some time, measured in minutes, just before the accident, he was at the rear of the train doing nothing in particular and that when the train backed, not being attentive to the situation, he was struck, There is the testimony of a witness, who reached him immediately after the accident, that "he said he was going to hang a light on the car and they backed up." This is the only evidence that Gorgenson was about to place the light. The red lantern which it was customary to use was in the caboose after the accident. While the evidence is slight we assume it to be sufficient, if believed, to show that the deceased was in the act of hanging a light when injured or preparing to do so.

The conductor gave the signal to back and the engine backed without sounding the whistle. The court submitted to the jury the question whether the trainmen should have known that the deceased might be at the rear of the train and in a place of danger so that it was negligent to back without giving him notice. In granting the motion for judgment notwithstanding the court expressed its views as follows: "From the evidence the court is of the opinion that the train crew were not charged with notice, nor could they, in the exercise of ordinary care, have had

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any reason to believe that the deceased would be in such close proximity to the rear end of the train when the coupling was made that he would be injured by reason of making the coupling in the way in which it was made."

We are of a like opinion. The rear section of the train had been standing for one hour and ten minutes. For substantially all that time it had been dusk or dark. The attaching of the light was but a moment's work. It involved no difficulty nor was it attended with particular danger. Considering the length of the stop and the very short time required to place the light we are unable to see that the trainmen were wanting in ordinary care in not anticipating that the deceased might be placing the light and in a place of peril at the precise time when they caused the train to back. The case of Thompson v. Minneapolis & St. Louis R. Co. 133 Minn. 203, 158 N. W. 42, is so different in its facts that it is not illustrative.

Judgment affirmed.

WILLIAM APELT v. ALBERT E. MELIN AND ANOTHER.[1]

November 9, 1917.

No. 20,506.

Action — joinder of parties — striking out counterclaim.

A cause of action in favor of the defendants against one of the plaintiffs in which no effective judgment can be entered without joining other parties with the plaintiff cannot be maintained unless such parties are joined.

Action in the district court for Hennepin county to recover $100 upon a promissory note. From an order, Hale, J., granting the motion of plaintiff to strike out from the records the counterclaim interposed by them, defendants appealed. Affirmed.

E. Luther Melin, for appellants.

John G. Priebe, for respondent.

[1]Reported in 164 N. W. 979.

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DIBELL, C.

This is an appeal by the defendants from an order striking out their counterclaim.

The action is on a promissory note. The defendants answered and interposed a counterclaim. The plaintiff demurred to the counterclaim upon the ground of insufficiency of facts. Upon the application of the plaintiff the counterclaim was stricken. No application is on file and the ground of it does not appear. We assume that it was upon the ground that the cause of action stated was not a proper subject of counterclaim and therefore irrelevant. There is some authority for a motion to strike out in such a case. Fergus Printing & Pub. Co. v. Board of Co. Commrs. of Otter Tail County, 60 Minn. 212, 62 N. W. 272. And see American Exchange Bank of Duluth v. Davidson, 69 Minn. 319, 72 N. W. 129. In any event no objection was made to the procedure and we make none. Of course, a failure to demur is a waiver of the objection that the cause of action pleaded is not the proper subject of counterclaim. 2 Dunnell, Minn. Dig. § 7619; Dunnell, Minn. Pl. § 375.

The answer alleges that the note in suit was given for usurious interest; that to secure the principal sum loaned the defendants gave the plaintiff William Apelt and Louisa Apelt, his wife, a deed in form which was in fact a mortgage; that at the same time they executed a collateral agreement on its face purporting to be a profit-sharing contract; that in fact the agreement was that the plaintiff and his wife were to have 18 per cent upon their loan, and that the arrangement for a deed and contract was simply a cover to hide usury. In effect the counterclaim is an action against the plaintiff and his wife to have the deed declared to be a mortgage, to have it adjudged that the obligation which it was given to secure was usurious, and to quiet title in the defendants. To the action Louisa Apelt is a necessary party. The land was conveyed to the plaintiff and her jointly. They were both parties to the alleged usurious agreement. Without her presence there can be no effective decree. It is not sought to make her a party. It is the general rule that a cause of action which the defendant cannot maintain against the plaintiff alone, or one which cannot be determined without bringing in new parties plaintiff, cannot be maintained, at least without bringing in such new parties. See G. S. 1913, §§ 7757-7758; Dunnell, Minn. Dig. Supp. 1916, § 7602; Dun-

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nell, Minn. Pl. § 357, et seq.; Campbell v. Jones, 25 Minn. 155; Wilcox v. Comstock, 37 Minn. 65, 33 N. W. 42; Little v. Simonds, 46 Minn. 380, 49 N. W. 186; Clay County Land Co. v. Alcox, 88 Minn. 4, 92 N. W. 464; Crosby v. Scott-Graff Lumber Co. 93 Minn. 475, 101 N. W. 610. Upon this state of the record there was no error in striking out the counterclaim.

Order affirmed.

JOHN L. SULLWOLD AND OTHERS v. CITY OF ST. PAUL.[1]

November 9, 1917.

No. 20,517.

City of St. Paul — objection to assessment for public improvement — "resident owners."

1. The words "resident owners" as used in section 243 of the charter of the city of St. Paul, considered and *held* to apply only to parties owning property on the line of the improvement and residing within the city.

Same — apportionment of damages and assessments — discretion of court.

2. In the award of damages and assessment of benefits where the improvement, when considered in connection with the property affected, is such that honest minds might differ, the apportionment thereof is a legislative function, and the courts will not interfere in the absence of a clear abuse of discretion.

Same — classification of owners — charter valid.

3. Section 243 of the charter of the city of St. Paul *held* not to be in conflict with the Fourteenth Amendment to the Federal Constitution.

Same — right of eminent domain.

4. Under the charter of the city of St. Paul, the council may condemn and take land and structures thereon, or as much thereof as may be necessary for the purposes of the improvement.

[1]Reported in 164 N. W. 983.

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In the matter of opening, widening and extending an alley across block 9, Whitney & Smith's Addition to St. Paul, John L. Sullwold, Charles A. Bettingen, and others, filed objections with the council of St. Paul. From the confirmation of the taking of their property and the award of damages to them on account thereof, the two persons named appealed to the district court for Ramsey county. The appeal was heard before Brill, J., who confirmed the assessment. From the judgment entered pursuant to the order confirming the assessment, John L. Sullwold and Charles A. Bettingen appealed. Affirmed.

Keller & Loomis, for appellants.

O. H. O'Neill and *John A. Burns,* for respondent.

QUINN, J.

Appeal from a judgment of the district court sustaining an order of the city council of the city of St. Paul, establishing an alley through a business block, awarding damages for the property sought to be acquired, and assessing the cost against the property benefited.

Proceedings were initiated, asking for the establishment of an alley 14 feet in width, across block 9, Whitney & Smith's Addition to St. Paul. Such proceedings were had that the city council made an order establishing the alley, awarding damages to the owners of property sought to be acquired and assessing the cost of the alley against the property found to be benefited thereby, and certified the award and assessment to the district court for confirmation.

The entire frontage on the alley is substantially 590 feet, divided into 7 parcels, and owned by 13 parties. While the proceeding was pending before the council, a petition in remonstrance, in due form, signed by 8 persons, owners of 4 of such parcels of land having a lineal frontage of 358 feet upon such proposed alley, was filed with the council. Three of these petitioners resided in the city, the other five residing outside the city, but within the state. The five owners of the other 3 parcels of land, having a lineal frontage of 232 feet upon the alley, resided in the city.

Section 243 of the city charter of St. Paul provides in part as follows:

"No public improvement, the cost or any part of which, shall be paid by an assessment on the property deemed benefited, shall be made if a

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petition of remonstrance as hereinafter provided is filed with the council at any time prior to the passage and adoption of the final order therefor. * * *

"Such petition shall describe the improvement or improvements, and shall be signed by not less than sixty (60) per cent of the resident owners, or their agents, of such property aforesaid representing not less than fifty (50) per cent of the lineal frontage on the line of such improvements * * *"

Upon the hearing in district court appellants offered such petition in evidence, and it was objected to upon the ground that it was incompetent, irrelevant and immaterial. The objection was sustained upon the ground, that the charter provided that the petition should be signed by not less than sixty (60) per cent of the resident owners of such property representing not less than fifty (50) per cent of the lineal frontage on the line of the improvement.

Much testimony was offered, and, on February 7, 1917, the district court made and entered separate orders affirming each award of damages, and also a separate order confirming the final order establishing the alley and affirming each assessment. Judgment was entered accordingly.

As we understand appellants contend: (1) That the words "resident owners" as used in the charter should be interpreted to mean parties owning property on the line of improvement and residing in the state; (2) that the petition of remonstrance was signed by the required number of qualified petitioners and therefore the alley was not legally established, and that the petition should have been admitted in evidence; (3) that the assessments and awards were grossly unfair and inequitable and could only have been made upon an erroneous principle of law or demonstrable mistake of fact; (4) that if the right of remonstrance were restricted to residents of the city, the charter would be invalid, as being in conflict with the Fourteenth Amendment of the Federal Constitution, and (5) that the proposed alley is subject to inconsistent rights.

The first two contentions may be disposed of together. The charter provides that no public improvement shall be made if a petition of remonstrance describing the improvement and signed by not less than sixty (60) per cent of the resident owners, representing not less than fifty (50) per cent of the lineal frontage on the line of the improvement, be filed

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with the council prior to the adoption of the final order therefor. The words "resident owners" as used in the charter can have reference only to those residing within the city as distinguished from nonresidents. While the charter may have the same effect as an act of the legislature, yet it does not constitute a law of the state. It is applicable to the city only, is a law of limited application, and the ruling of the trial court was correct. It follows that the petition was insufficient, not admissible in evidence, and the court had jurisdiction in the premises.

We think it clearly appears that the improvement, when considered in connection with the property affected, was such that honest minds might differ in the award of damages and assessment of benefits; that the apportionment thereof was a legislative function, in which the court will not interfere unless there is a clear abuse of discretion. Hughes v. Farnsworth, 137 Minn. 295, 163 N. W. 525. We discover no such abuse in either the award or assessment in this case. The contention of appellants cannot be sustained.

Appellants' fourth contention is, that the section of the charter under consideration is in conflict with the Fourteenth amendment to the Federal Constitution in that the improvement is not to be made if 60 per cent of the resident owners of the property on the line thereof shall file with the council a remonstrance against the improvement, which right is not given to nonresidents, thereby discriminating against them. In disposing of this question, the Supreme Court of the United States, in the case of Field v. Barber Asphalt Pav. Co. 194 U. S. 618, 621, 622, [24 Sup. Ct. 784, 48 L. ed. 1142] says: "It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. * * * The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the nonresidents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing

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for the improvement. When the assessment is made it operates upon all alike." This decision applies and governs the case under consideration.

Section 234, subd. 3, of the charter provides:

"When the council, by ordinance, shall determine that any street, alley, lane, parkway, boulevard or other public thoroughfare or highway, containing such boundary or building lines, shall be opened, widened, extended, straightened or altered for actual public use and enjoyment to its full width and extent or to the limits of said boundary or building-lines, the council shall thereupon take and condemn or order the taking and condemnation of any and all permanent buildings or structures or so much as may be necessary, remaining or standing on any and all lands being within and lying between such boundary or building lines, and at the same time, remove or cause the removal of any and all temporary buildings or structures aforesaid."

Under this provision the council may condemn and take land and structures thereon or as much thereof as may be necessary for street or alley purposes. But, where land is taken against the will of the owner, the statute which authorizes the proceeding will be construed to authorize the taking of the interest only which is required by the necessity of the contemplated use, and that is just what the council sought to do in the instant case. Smith v. City of Minneapolis, 112 Minn. 446, 128 N. W. 819. There is no merit in the contention that the proposed alley is subject to inconsistent rights.

Affirmed.

F. J. SKALSKY v. C. G. JOHNSON.[1]

November 9, 1917.

No. 20,525.

Contract to drill well — warranty as to quality of water.

Where a farmer, desiring water for farm use, hires a well-driller to drill a well in a particular place, there is no implied warranty by the well-driller of the quality of the water which may be obtained.

[1]Reported in 164 N. W. 978.

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Action in the district court for Jackson county to recover $354.35 for work done and materials furnished in drilling a well. The case was tried before Nelson, J., who directed a verdict in favor of plaintiff for $408.56. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Knox & Faber, for appellant.

E. H. Nicholas, for respondent.

HALLAM, J.

Plaintiff is a well-driller. Defendant is a farmer owning a farm in Martin county. The parties entered into an agreement in writing by which plaintiff agreed "to get for the party of the second part (defendant) water, furnish casing * * * and guarantee the well for one year." Defendant agreed "to do all hauling, board the crew and team, pay the party of the first part (plaintiff) $1.55 per foot; paying $50.00 at the time the well is completed and the balance in 30 days thereafter, providing plenty of water. If not water enough in the first vein the party of the first part (plaintiff) will dig deeper for $1.55 per foot." Plaintiff sued for the contract price. The court directed a verdict in his favor. Defendant appeals.

The contract is silent as to the location of the proposed well, but it is admitted that it was contemplated that the well was to be drilled on defendant's farm. Plaintiff drilled a well to a depth of 277 feet and obtained an abundant supply of water. There was no stipulation in the contract as to the quality of the water to be obtained. There is no claim that the well was not properly drilled nor that plaintiff could have obtained better water by drilling deeper or by drilling in any other manner than he did. The defense is that the purpose of drilling the well was to obtain water for farm use and that plaintiff knew of that purpose, and that the water obtained was not fit for that purpose. The contention of defendant is that "a man who undertakes to dig a well on a farm, impliedly warrants that he will furnish water which is reasonably fit for farm uses." The trial court overruled this contention. With this ruling we agree.

There is a well-known rule that where a manufacturer contracts to supply a certain article which he manufactures, to be used and applied to a particular purpose, under circumstances such that the buyer necessarily

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trusts to his judgment and skill, there is an implied warranty that the article furnished shall be reasonably fit for the purpose for which it is ordered. Goulds v. Brophy, 42 Minn. 109, 43 N. W. 834, 6 L.R.A. 392; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. ed. 86. The basis of the rule is that the buyer relies on the seller's skill and judgment to select or prepare something suitable for the buyer's purpose. Farrell v. Manhattan Market Co. 198 Mass. 271, 84 N. E. 481, 15 L.R.A.(N.S.) 884, 126 Am. St. 436, 15 Ann. Cas. 1076. In such cases the purpose is one of the essential matters of the contract, and the seller is bound as a condition of the contract to supply an article reasonably fit for the purpose and is considered as warranting that the article furnished is of such character. This principle was applied in Breen v. Moran, supra, to a contract by a manfacturer of cut stone to furnish granite blocks for use in the construction of a sewer, and in Kellogg Bridge Co. v. Hamilton, supra, to a sale of a contract, including work already done in the construction of a bridge, and it has been applied to sales, by a dealer, of food stuffs intended for immediate consumption. Sinclair v. Hathaway, 57 Mich. 60, 23 N. W. 459, 58 Am. Rep. 327.

We think this rule is not applicable to the facts of this case. The rule applies only so long as the reason for it applies. It has no application where the order is for a specific article of a recognized kind or description, even though the seller is informed that it was to be used for a particular purpose. Wisconsin R. P. Brick Co. v. Hood, 54 Minn. 543, 56 N. W. 165. The rule does not apply where it is well known that the party supplying the article has no power or control over its quality or kind. A party might undertake generally to furnish water for domestic use with no stipulation as to source of supply, and it might well be then implied that the person to whom it was to be furnished trusted to him to procure wholesome water, and the law would imply a warranty to furnish water suitable for domestic use. Brymer v. Butler Water Co. 172 Pa. St. 489, 33 Atl. 707. And a man may in any case be held to warrant against unfitness caused by his own conduct or fault. Gold Ridge M. Co. v. Tallmadge, 44 Ore. 34, 41, 74 Pac. 325, 102 Am. St. 602. But where a contract is to dig a well in a particular place, all the reasons for implying a warranty of the quality of the water to be found are want-

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ing. There is no sound reason for holding that because a well-digger agrees to dig a well on a farmer's farm he warrants to the farmer the quality of the water underlying the farm. See Butler v. Davis, 119 Wis. 166, 96 N. W. 561; Lemke v. Hage, 142 Wis. 178, 125 N. W. 440, 135 Am. St. 1066; Omaha Consolidated V. Co. v. Burns, 49 Neb. 229, 68 N. W. 492. We hold there was no implied warranty in this case.

Order affirmed.

JOHN McGILLIVRAY v. GREAT NORTHERN RAILWAY COMPANY.[1]

November 9, 1917.

No. 20,529.

Railway — insufficient evidence of negligence — res ipsa loquitur.

A locomotive of defendant became derailed at a highway crossing by striking a pile of sand and gravel that was upon the crossing. Plaintiff, the fireman, was injured. The evidence failed to show how the sand and gravel came to be there, or that it had been there any length of time before the accident. It is *held*:

(1) The rule of res ipsa loquitur has no application, as the crossing was not in the exclusive possession or control of defendant.

(2) The evidence did not justify an inference of negligence on the part of defendant.

Action in the district court for St. Louis county to recover $25,000 for injuries received while in the employ of defendant. The case was tried before Dancer, J., who at the close of plaintiff's case granted defendant's motion to dismiss the action. From the order of dismissal, plaintiff appealed. Affirmed.

W. A. Watts and *W. P. Crawford,* for appellant.

Baldwin, Baldwin & Holmes and *M. L. Countryman,* for respondent.

[1]Reported in 164 N. W. 922.

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BUNN, J.

This appeal is by plaintiff from an order denying a new trial. The action was dismissed at the close of plaintiff's case on the ground that the evidence would not sustain a verdict for plaintiff. The question for our decision is whether or not this ruling was right.

The case as it stood when the motion to dismiss was granted may be stated as follows: Plaintiff was the fireman on an engine of defendant that was pulling a passenger train between the cities of Grand Rapids and Virginia, Minnesota. Between these points defendant's railroad passes over at grade a highway crossing at the flag station of Alice. July 4, 1916, as the engine was running over this crossing it left the track and with the baggage car was derailed. The engine ran some distance on the ties, and then tipped over. Plaintiff, who was in the cab of the engine attending to his duties as fireman, sustained the injuries to recover for which this action was brought. The evidence conclusively showed that what caused the derailment was a pile of sand and gravel upon the crossing. It failed utterly to show how this sand and gravel came to be on the crossing. There was no evidence as to who placed it there, or that it had been there any length of time before the accident.

Plaintiff makes two contentions: (1) The rule of res ipsa loquitur applies; (2) the proof justified an inference of negligence on the part of defendant with respect to the condition of the track at the crossing at the time of the accident.

1. The res ipsa loquitur rule does not apply. Without stopping to consider whether the facts would otherwise bring the case within the rule, it is clear that they do not, for the reason that the condition of the crossing was not exclusively under the defendant's control. The crossing was part of a public highway, heavily traveled. That one of the essentials to the application of the rule is that the thing causing the injury must be under the exclusive control of defendant is too well understood to require discussion. Ulseth v. Crookston Lumber Co. 97 Minn. 178, 106 N. W. 307; Lehman v. Dwyer Plumbing & H. Co. 104 Minn. 190, 116 N. W. 352. Counsel for plaintiff seek to show exclusive control by reference to the statutes of this state (G. S. 1913, §§ 4256, 4257), requiring railroad companies to keep their crossings in repair, and our

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decisions on the subject. We confess our inability to see the bearing of these statutes or decisions on the rule of res ipsa loquitur.

2. As no inference of negligence arose from the happening of the accident, it was incumbent on plaintiff to supply evidence from which an inference of negligence would be justified. A finding of negligence could not rest on speculation or guess work. Some testimony as to the worn condition of the crossing planks was introduced, and it appeared that two persons were standing on the crossing as the train approached, and that one of them signalled the train to stop. Counsel asks us to infer from all this that the crossing was being repaired by defendant, and that the men failed in their duty to warn the train of the danger. There was no evidence whatever that the crossing was being repaired, or that the men seen standing there were employees of defendant. That it was the legal duty of defendant to keep this crossing in a safe condition for public travel raises no presumption or inference which justifies a finding that the sand was dumped on the crossing by employees of defendant engaged in the performance of this duty. Indeed it is difficult to see how sand could replace or repair worn planks. It is just as likely that it came there accidentally through some agency not connected with defendant. The evidence was wholly insufficient to justify permitting the jury to guess that defendant's employees placed the sand on the crossing and were negligent in not warning the train. Council for plaintiff does not so much contend that the evidence as it stood would justify a verdict, as he does that the court should have required defendant to disclose any knowledge it had of how the sand came to be on the crossing. This would be in effect applying the res ipsa loquitur rule. That rule not being applicable, we know of no principle upon which it can be said to be the duty of defendant to offer evidence until the plaintiff has made a case which, if unexplained, would justify a recovery. The evidence was wholly insufficient, in our judgment, to justify an inference of negligence on the part of defendant.

Order affirmed.

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STATE EX REL. TRI-STATE TELEPHONE & TELEGRAPH COMPANY v. FRANK OSCAR HOLM.[1]

November 9, 1917.

No. 20,536.

Telephone franchise — surrender to village of Litchfield.

Chapter 152, Laws 1915, placed all telephone companies doing business in this state under the supervision and control of the Railroad and Warehouse Commission, and any telephone company, holding a franchise from a municipality at the time the law took effect, is permitted by section 15 thereof to surrender such franchise and receive, in lieu thereof, from the commission an indeterminate permit to occupy the streets of the municipality with its poles and wires. It is *held* that no private proprietary right, vested in the village of Litchfield by the franchise issued by its council in 1905, was impaired or affected by the written declaration of surrender tendered by relator to the village clerk for filing pursuant to said section 15.

Upon the relation of Tri-State Telephone & Telegraph Company the district court for Meeker county granted its alternative writ of mandamus directing Frank Oscar Holm, as village clerk of the village of Litchfield, to accept and file in his office the declaration or surrender of franchise and sign the proposed certificate or some other certificate complying with the provisions of section 15, chapter 152, Laws 1915, and file the same with the Railroad and Warehouse Commission. The matter was heard before Qvale, J., who quashed the writ. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

Harlan P. Roberts and *Luke K. Sexton,* for relator.

Lyndon A. Smith, Attorney General, and *James E. Markham,* Assistant Attorney General, filed a brief and argument as amici curiae.

Alva R. Hunt, for respondent.

HOLT, J.

Proceeding in mandamus. By chapter 152, p. 208, Laws 1915, the

[1]Reported in 164 N. W. 989.

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legislature undertook to place all telephone companies, doing business in this state, under the supervision and control of the state Railroad and Warehouse Commission, vesting that body with the same jurisdiction, control and supervisory power over telephone companies as it already had over railroad and express companies. The acts prescribing the power and duties of the commission in respect to railroads and express companies are made to apply to telephone companies. The commission is given the exclusive right to grant authority to any telephone company to construct telephone lines in any municipality of the state and to prescribe the terms and conditions upon which construction may be carried on. But the governing body of the municipality is to retain the same powers of regulation which it had previous to this enactment in respect to the location of poles and wires so as to prevent any interference with the safe and convenient use of the streets by the public. Section 15 thereof, the one attacked in this appeal, reads:

"Any telephone company operating under any existing license, permit or franchise or which shall hereafter before the taking effect of this act, acquire any license, permit or franchise, may, upon filing with the clerk of the municipality which granted such franchise a written declaration that it surrenders such license, permit or franchise, receive in lieu thereof an indeterminate permit as defined in this act; and such telephone company shall thereafter hold such permit under all the terms, conditions and limitations of this act. The filing of such declaration shall be deemed a waiver by such telephone company of the right to insist upon the fulfilment by any municipality of any contract theretofore entered into relating to any rate, charge or service made subject to regulation by this act. Upon filing such written declaration by the telephone company, the clerk of the municipality shall file with the commission a certificate showing that fact and the date thereof, and thereupon it shall receive an indeterminate permit from the commission conferring the same rights as if originally granted under this act."

From the writ and return it appears that in 1905 relator obtained a 13 year franchise or license from the village of Litchfield to occupy such streets and alleys therein as may be necessary for the purpose of maintaining poles, wires and fixtures for a local telephone exchange. Certain conditions are attached to the franchise, respecting the height of the

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poles, the placing thereof, the right of the village to string the wires of its fire alarm system thereon, and the fixing of a maximum toll to be charged for telephone service; also, in consideration of the franchise, relator must furnish the village six telephones for use in the public buildings in the village and pay $100 annually into the village treasury. Relator accepted the franchise, installed and operates a local telephone exchange in the village. In July, 1916, relator presented to the respondent, the village clerk, a written declaration duly executed surrendering its franchise, in accordance with the provision of the section above quoted, and requested the clerk to file the same and issue and file the certificate with the commission as therein prescribed. The clerk refused, and this proceeding was instituted. The trial court held that the acceptance of the franchise created a binding contract between the village and relator, whereby the village acquired vested rights which could not be affected or impaired by subsequent legislation; hence the act, insofar as by section 15 it seeks to affect an unexpired franchise, is void and unconstitutional.

The village was created by special act (chapter 27, p. 561, Sp. Laws 1887). The village is empowered to keep the streets free from obstructions, abate nuisances and encroachments thereon, and to care for, supervise and control all public highways, streets and alleys therein. Its council is specifically authorized to grant a franchise or license to persons or corporations to erect telephone wires and poles along streets and alleys. The power or right granted the village to thus license the occupation of the streets by telephone companies, was not augmented by the general provision of the charter investing the village with all the powers generally possessed by municipal corporations at common law, for these latter powers are generally understood to be confined to the five subjects enumerated in 1 Blackstone, Comm. 475; 28 Cyc. pp. 260 and 261. It will be observed that the franchise or license which the council granted, and the only one the council could grant, to relator was confined wholly to an occupation of the public streets by its poles and wires. As caretaker of the public streets the village acts merely as a governmental agency. The legislature can at any time modify, limit or revoke the agency granted the municipality in this respect. By said chapter 152, p. 208, Laws 1915, it took away from the municipalities the power to license the occupation of the streets by telephone companies and placed it exclusively

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with the Railroad and Warehouse Commission. However, the regulation of the use of the streets by the companies so as not to interfere with the safety and convenience of the public travel thereon is still retained by the municipalities. If the village acted merely as an agent of the state in granting the franchise to relator, it must be true that the state and relator are the only parties to the contract and can terminate the same by mutual consent as provided in the section quoted, unless the franchise had vested certain private proprietary rights in the village which are protected by the constitutional provision inhibiting the impairment of vested contract rights.

It is quite clear to us that no vested right of the village was impaired or affected by the legislature when it undertook to interfere with the rates established in this franchise. Insofar as rates were therein fixed it was for the benfit of the public. And it is unquestioned that the legislature is supreme when it comes to prescribing or altering the rates which public service corporations may exact from their patrons. As said by Pitney, J.: "The constitutional limitations which prevent the legislature from impairing the obligations of contracts do not debar it from annulling obligations that are due to the public." Cortelyou v. Anderson, 73 N. J. Law, 427, 63 Atl. 1095. The regulation of public utilities is an exercise of the police power of the state and resides with the legislature. Neither can there be any doubt that relator with its local telephone exchange, through which connections and communications may be had with the outside world, comes within the definition of a public service corporation. The main purpose of chapter 152, p. 208, Laws 1915, was to regulate and control telephone companies in respect to service to the public. Insofar as existing municipal franchises related to such services, no good reason suggests itself why the same might not be modified or annulled, at any time, by mutual agreement between the legislature and the companies, as provided in the section above set out, just as readily and lawfully as such franchises could have been changed or terminated by mutual agreement between the municipality and telephone company concerned, had not chapter 152, p. 208, Laws 1915, been enacted.

If the franchise vested any private proprietary rights in the village there can be no impairment or forfeiture thereof. The village insists that such vested rights came to it by the franchise, namely: The free

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use of six telephones in its buildings, the privilege to string its fire alarm wires on relator's poles, and the obligation to pay $100 annually into the village treasury.

The alleged private vested right of free telephone service need not be considered, for by section 11 of the act the surrender of the franchise by relator does not operate to cancel or destroy the stipulation to render free telephone service to the village.

The maintenance of fire alarm facilities pertains to one of the governmental functions of a municipality, hence provisions against further needs in that line, in the franchise in question, can scarcely come within the definition of protected private rights of the village. Nor is it clear that relator may be permitted to rid itself of the burden of carrying the village fire alarm wires on its poles, for the Railroad and Warehouse Commission may prescribe the terms and conditions upon which telephone construction may be had in a municipality. (Section 13, chapter 152, p. 211, Laws 1915.)

The only item in the franchise, affected by a surrender certificate, concerning which a claim might reasonably be made that it was a private property right of the village, is the one calling for an annual payment by relator into the village treasury. But when it is considered that this payment was exacted solely for the license to a use of the public streets, in which streets the village possessed no proprietary rights whatsoever, but only those exercised as a governmental agency, the claim vanishes. The title to the yearly payment fell whenever the legislature saw fit to take the control of the streets for the purpose of permitting relator's poles to be set therein from the village council and vest it in another agency.

The principles of law which have guided us to the conclusion reached may be found announced in Merchants Nat. Bank of St. Paul v. East Grand Forks, 94 Minn. 246, 102 N. W. 703; State v. George, 123 Minn. 59, 142 N. W. 945; City of Worcester v. Worcester Consol. St. Ry. Co. 182 Mass. 49, 64 N. E. 581, affirmed in 196 U. S. 539, 25 Sup. Ct. 327, 49 L. ed. 591; City of Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210.

The village clerk should have been compelled to file relator's written declaration and to file his certificate attesting that fact with the Railroad and Warehouse Commission.

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The order is reversed and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

PETER J. HEUSER v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.[1]

November 9, 1917.

No. 20,543.

Trial — permitting leading questions.

1. Leading questions are largely in the sound discretion of the trial court, and in the instant case there was no abuse of such discretion.

Same — amendment of pleading.

2. Amendment of a pleading during the trial, rests largely in the discretion of the trial court.

Attorney and client — offer to prove solicitation of case by layman inadmissible.

3. An offer to prove that a case came to an attorney at law through the solicitation of a layman, not admissible under the pleadings.

Evidence — record of proceedings in Nebraska court inadmissible.

4. A transcript of proceedings in the district court in the state of Nebraska, where, defendant claims, the contract forming the basis of the cause of action in the present case was adjudicated, was properly rejected upon the ground that the Nebraska court did not pass upon the same contract.

Evidence sustained directed verdict.

5. *Held*, under the evidence, that the trial court was warranted in directing a verdict in favor of intervener.

Action in the district court for Hennepin county to recover $25,000 for injuries received while in defendant's employ. The case was dismissed by plaintiff in person. George C. Stiles, attorney for plaintiff, thereafter moved to vacate the dismissal of the action, to the extent neces-

[1]Reported in 164 N. W. 984.

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sary to enable him to obtain the relief sought by him, and to reinstate the case upon the calendar for the purpose of entitling him to recover $2,500 against defendant for his fees and compensation for services rendered the plaintiff in the action, for which sum he claimed a lien. The facts are stated in the opinion. The motion was heard by Hale, J., who ordered that he be made a party to the action and be permitted to intervene therein. He filed a complaint in intervention to which defendant made answer. The matter was tried before the same judge, who directed a verdict in favor of intervener for $2,289.37. From an order denying its motion for a new trial, defendant appealed. Affirmed.

Barrows & Stewart, for appellant.

Brooks & Jamison and *D. C. Edwards,* for respondent.

QUINN, J.

On March 7, 1916, the plaintiff, while in the employ of defendant in the state of Nebraska, met with an accident which later necessitated the amputation of his arm. The circumstance gave rise to a cause of action against the defendant. He employed the intervener to commence and prosecute an action for him against the defendant to recover damages, the suit to be commenced in Hennepin county, this state. The agreement was reduced to writing and in the following terms:

"Minneapolis, Minn. May 31st, 1916.

"I hereby retain and employ George C. Stiles, as attorney at law, to bring suit and represent me in prosecution and recovery of my claim against the C. B. & Q. Railway Company, for damages arising from personal injuries received by me through the negligence of that company on the 7th day of March, 1916, and agree to pay him a sum equal to one-fourth of the amount finally recovered from said Railway Company by me, either by suit or by settlement, but no settlement of said claim shall be made without first securing my consent thereto.

Peter J. Heuser, Claimant.

I hereby accept the above claim and cause of action and agree to prosecute the same to settlement or judgment, on the terms above set forth.

George C. Stiles."

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Subsequently suit was brought and issue joined in the usual way. While the case was upon the calendar awaiting trial, defendant, without notice to intervener, settled the cause of action and paid to plaintiff $9,000 as damages. On November 10, 1916, the plaintiff filed a dismissal of the action with the clerk of the court, but the dismissal was not entered in the clerk's register. Upon an order to show cause, the court allowed the plaintiff's attorney to intervene and have his right to a lien for attorney's fees and the amount thereof determined, and directed issues to be framed accordingly. Issues were so framed and the case came on for trial before the court and a jury. At the close of the testimony the trial court directed a verdict, in favor of the intervener, for $2,250 and interest from the date of settlement.

Upon the trial defendant offered to prove that the case came to intervener through the solicitation of a layman employed by him for that purpose, who was to receive for his services a share of the proceeds. There was no allegation in defendant's answer of the facts sought to be proved, and an objection to the proof upon that ground was sustained. The defendant then asked permission to amend its answer by setting up the facts sought to be proved, which, upon objection, was denied. The defendant also offered in evidence the authenticated files of the district court of Lancaster county, Nebraska, which court the defendant claimed had adjudicated the contract on which intervener's employment by plaintiff was based. The court sustained an objection to the offer, holding that the Nebraska court did not pass upon the contract on which the intervener's claim of lien was predicated, but upon an entirely different contract. From an order denying its motion for a new trial, defendant appealed.

With reference to appellant's second and third assignments of error relating to the rulings of the trial court on leading questions, but brief mention is required. Leading questions are largely in the sound discretion of the trial court, and in the instant case we discover no abuse of such discretion. There is no merit in the objection that the questions referred to called for a conclusion.

The ruling of the trial court upon defendant's motion to amend its answer is made the basis of the fourth assignment of error. The proposed amendment was objected to upon the ground of legal surprise, and the

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objection was sustained. The amendment was a discretionary matter. 2 Dunnell, Minn. Dig. § 7707, and cases cited.

The offer to prove that the case came to the intervener through the solicitation of a layman, was not admissible under the pleadings. The allegation in the answer was to the effect that the intervener entered into some pretended agreement with the plaintiff, in reference to the prosecution of the action, but that such contract was champertous, null and void, and was to be performed in the state of Nebraska. At best this allegation was but a legal conclusion and insufficient to permit of the testimony offered.

The plaintiff resided in the state of Nebraska. Intervener is a practicing lawyer and resides in Minneapolis, and has never been in the state of Nebraska. In August, 1916, the defendant commenced an action in the district court of Lancaster county, Nebraska, against the plaintiff and intervener, to enjoin them from further prosecuting this case, and to have the contract of employment referred to in its petition in the Nebraska case declared null and void. The summons in that case was served upon intervener by publication only. The only contract of employment referred to in the petition provided for payment to intervener of 40 per cent of the amount of recovery and he was to finance the litigation. The court's order limited the adjudication to the contract referred to in the petition. It is clear that the court did not have jurisdiction of the intervener so as to determine his contractual rights with respect to any contract. All matters passed upon were determined upon the petition and the stipulation of Heuser and the railway company. There was no testimony offered. The contract constituting the basis of the present action was executed in the office of the intervener in Minneapolis, on May 31, 1916. It provided for payment to intervener of 25 per cent of the amount recovered, and not 40 per cent, as did the one referred to in the Nebraska case, and it contained no provision for the intervener to finance the litigation. We think the court below was right in holding that the Nebraska court did not pass upon the contract here in question, and that the transcript was immaterial and properly rejected. It is argued that the cause of action being one arising under the Federal Employers' Liability Act, the attorney's lien given by the state statute does not apply. This contention has been settled adversely to

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appellant, by this court, in Holloway v. Dickinson, 137 Minn. 410, 163 N. W. 791.

We are of the opinion that the defendant had a full and fair hearing in the court below under the issues as framed, that there was no prejudicial error, and that the court was right in directing a verdict as it did.

Affirmed.

MAGGIE ROBERTSON v. WILLIAM P. ROBERTSON.[1]

November 9, 1917.

No. 20,544.

Equity jurisdiction — separate maintenance of wife.

1. A court of equity, independent of a proceeding for divorce or separation and without statutory authorization, has jurisdiction to decree the wife separate maintenance.

Same — temporary maintenance.

2. In such action temporary support pendente lite may be given the wife.

Same — attorney's fees and costs.

3. And an allowance may be made for attorney's fees and costs of suit.

Same — allowance not excessive.

4. The allowance made is *held* not excessive.

Action in the district court for Crow Wing county for separate maintenance. From an order, Wright, J., directing defendant to pay plaintiff $20 twice each month, $75 attorney's fees and $10 suit money, defendant appealed. Affirmed.

W. W. Bane, for appellant.

M. E. Ryan, for respondent.

[1]Reported in 164 N. W. 980.

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DIBELL, C.

This is an action in equity by a wife against her husband for separate maintenance. The court allowed temporary support, suit money and attorney's fees. From the order making such allowance the defendant appeals.

1. While there is a contrariety of decision the prevailing and growing view is that a court of equity, independent of a proceeding for divorce or separation, has jurisdiction to decree the wife separate maintenance. See note to Lang v. Lang, 70 W. Va. 205, 73 S. E. 716, in 38 L.R.A.(N. S.) 950, and Ann. Cas. 1913D, 1129; note to In re Popejoy, 26 Colo. 32, 55 Pac. 1083, in 77 Am. St. 222; 21 Cyc. 1598, 1603; 10 Dec. Dig. Husband & Wife, § 285, et seq.; 26 Cent. Dig. Id. §§ 1074-1099; 1 R. C. L. 878, et seq.; 2 Nelson, Divorce & Separation, § 1000, et seq. The prevailing view is the settled law of this state. Stephen v. Stephen, 102 Minn. 301, 113 N. W. 913; Baier v. Baier, 91 Minn. 165, 97 N. W. 671; Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525, L.R.A. 1917D, 971.

2. In such an action temporary support in the nature of temporary alimony pendente lite may be granted and this without statutory authorization. Galland v. Galland, 38 Cal. 265; Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657; Simpson v. Simpson, 91 Iowa, 235, 59 N. W. 22; McFarland v. McFarland, 64 Miss. 449, 1 South. 508; Milliron v. Milliron, 9 S. D. 181, 68 N. W. 286, 62 Am. St. 863. And see citations above.

3. And an allowance for attorney's fees and the costs of suit may be made. Finn v. Finn, 62 Iowa, 482, 17 N. W. 739; Milliron v. Milliron, 9 S. D. 181, 68 N. W. 286, 62 Am. St. 863; McFarland v. McFarland, 64 Miss. 449, 1 South. 508; Simpson v. Simpson, 91 Iowa, 235, 59 N. W. 22. The defendant objects to the allowance of attorney's fees and suit money and invokes the rule that costs are statutory and that a court of equity has no discretionary power to impose them save such as the statute gives. See G. S. 1913, § 7973, et seq.; Atwater v. Russell, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26. The rule is without application. Suit money and attorney's fees are allowed the wife to the end that she may maintain the necessary suit against her husband. In effect and in a proper sense the allowance is for her support, assistance and maintenance and is not an award of costs within the statute.

4. The court made a temporary allowance to the plaintiff of $40 per

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month for support and $75 attorney's fees and $10 suit money, and it is urged that it is excessive. The defendant works in the railroad shops at Brainerd. His earnings are from $75 to $80 per month. He has some property, including a home, which apparently the plaintiff occupies. The allowance impresses us as liberal. It should not be so large as unduly to oppress the defendant and he as well as his wife has the right to share in his earnings. It is not so excessive as to justify interference. It is but temporary. If the plaintiff prevails upon the trial the court will be in position upon the evidence taken to make a just award.

Order affirmed.

M. L. FROST v. FRANK JEROUSEK.[1]

November 9, 1917.

No. 20,551.

Pleading — departure.

In an action on a promissory note, in which the answer alleges that the note was without consideration and never became effective, a reply which sets forth the contract under which the note was executed and the actual consideration therefor, tends to show that such defense is not well founded, and is not a departure from the cause of action upon the note.

Action in the district court for Jackson county to recover $130 upon a promissory note. The substance of the pleadings is given in the second paragraph of the opinion. From an order, Nelson, J., striking from the reply certain paragraphs and an exhibit attached thereto, plaintiff appealed. Reversed.

Knox & Faber, for appellant.

E. H. Nicholas, for respondent.

[1]Reported in 164 N. W. 988.

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TAYLOR, C.

Plaintiff appeals from an order which struck out all the new matter in his reply on the ground that it was a departure from the cause of action alleged in his complaint.

Plaintiff brought suit upon a promissory note alleged to have been executed by defendant to the Brown National Bank and to have been indorsed and delivered to plaintiff by the bank. The answer admitted the execution of the note, and then alleged as an affirmative defense that it was delivered to the bank upon the condition that it should not become effective until defendant applied for a loan thereon; that defendant never applied for or received any loan, and that the note was wholly without consideration and void. The reply set forth a contract between defendant and his wife and other landowners as parties of the first part, and plaintiff as party of the second part, whereby plaintiff agreed to construct a tile drain through land belonging to defendant's wife and land belonging to other parties of the first part, and the several landowners agreed to pay him certain specified amounts therefor and to deposit such amounts in the bank before the commencement of the work. The reply further alleged that defendant's wife agreed to deposit $130 as her part of the contract price but did not have the money, and that, by agreement between plaintiff and defendant, the note in controversy was executed for that amount, and was deposited and accepted, before the commencement of the work, in lieu of the money which she had agreed to deposit for her part of the contract price, and that plaintiff thereafter fully performed his contract. The reply contained no demand for relief.

The answer admitted the execution of the note, but sought to avoid liability upon it on the ground that it never became effective and was without consideration. The reply is aimed at this defense, and alleges facts tending to show a consideration for the note, and that the condition upon which it was to become effective had been performed. The cause of action is still based upon the note, and the reply is not a departure therefrom, but tends to support such cause of action by showing that the alleged defense is not well founded.

Order reversed.

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STANDARD LITHOGRAPHING & PRINTING COMPANY v. TWIN CITY MOTOR SPEEDWAY COMPANY.[1]

November 9, 1917.

No. 20,555.

Insolvency — petition to file claim — discretionary order.

1. In an application by a receiver of an insolvent corporation to present for allowance a claim against another insolvent corporation, also in the hands of a receiver, made after the expiration of the time limited for the presentation of claims against it, the court properly considered the merits of the claim sought to be presented, especially since the same could be determined from an inspection of written contracts not in dispute, so that there was no occasion to pass upon conflicting affidavits.

Same.

2. While, perhaps, the court was not justified in finding that the receiver who made the application had not personally used due diligence in the matter, the showing suggests a situation where the creditors and the stockholders of his insolvent, because of lack of diligence or want of right, are not in position to assert the claim sought to be presented.

Same.

3. The order denying the application is a discretionary order, and no abuse of judicial discretion is made to appear.

The motion of Charles S. Kidder, as receiver of Sperry Realty Company, insolvent, to relieve him from his default and permit him to file a claim and complaint in intervention in behalf of that company in the above entitled action in the district court for Ramsey county, was objected to by one of the stockholders of the Twin City Motor Speedway Company. The motion was heard by Kelly, J., and denied. From the order denying the motion, Charles S. Kidder, as such receiver, appealed. Affirmed.

Orr, Stark & Kidder, for appellant.

Lancaster, Simpson & Purdy and *L. E. Meichen,* for respondent.

[1]Reported in 164 N. W. 986.

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HOLT, J.

A receiver was appointed to wind up the affairs of the Twin City Motor Speedway Company, hereinafter referred to as the Speedway Company, a corporation, and an order was made and filed September 1, 1916, requiring creditors to present their claims for allowance within six months from that date, or be barred from participating in the funds to be collected in the proceeding. The next month an assessment of 100 per cent was ordered against all the stockholders. On June 10, 1916, a judgment creditor of the Sperry Realty Company, hereinafter called the Realty Company, a corporation, began a suit to have a receiver appointed for that company, an execution on the judgment having been returned unsatisfied. In that proceeding appellant was duly appointed receiver and qualified July 3, 1916. On April 12, 1917, appellant obtained an order requiring the receiver of the Speedway Company to show cause why the appellant should not be permitted to present and have allowed a claim, held by the Realty Company at the time of its insolvency, against the Speedway Company, notwithstanding that the time fixed for presenting claims had expired. The court denied the application and discharged the order to show cause, on the grounds that appellant had not used due diligence in discovering the claim, and also on the ground that the claim had been wiped out more than five months prior to appellant's appointment as receiver, and that fact was good and sufficient reason for appellant's ignorance of the existence of any claim. From such order this appeal is taken.

Two legal propositions bearing upon the decision herein are accepted by all parties as settled. The one is, that we cannot reverse the order unless an abuse of judicial discretion is made to appear. See cases cited in 1 Dunnell, Minn. Dig. § 399. And the other is, that the court is not to determine upon conflicting affidavits the merits of a claim or defense in an application to set aside a default. Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. 530; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; Queal & Co. v. Bulen, 89 Minn. 477, 95 N. W. 310; Fink v. Woods, 102 Minn. 374, 113 N. W. 909; Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

But whether a default is to be removed and the party permitted to make his defense or assert his claim in an action or legal proceeding,

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depends largely upon the showing made as to due diligence and the existence of a meritorious defense or claim. The court does not abuse judicial discretion when a party is refused the opportunity, after the given time has elapsed, to litigate a claim which has ceased to exist, or which is inequitable, or of no legal merit. The cases already cited so indicate, and still more to the point are: St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66; Town of Hinckley v. Kettle River R. Co. 70 Minn. 105, 72 N. W. 835; McClymond v. Noble, 84 Minn. 329, 87 N. W. 838, 87 Am. St. 354; Neff v. Clark, 95 Minn. 1, 103 N. W. 562, a case in certain features resembling the one at bar; and W. R. Lynn Shoe Co. v. Schunk, 101 Minn. 22, 111 N. W. 729. It is true, that it could not well be held upon the showing here that appellant personally was guilty of any neglect in failing seasonably to discover the claim he seeks to assert, or that there was lack of diligence in applying for relief after discovery thereof. But he acts here in a representative capacity and his personal knowledge or conduct is not alone decisive of the question. The probability of the legal existence of the claim presented, as already stated, may properly be considered, so also may the situation, knowledge and conduct of those whom appellant represents, namely, the creditors and stockholders.

The claim of appellant as exhibited in his proposed complaint is upon a written contract by which the Realty Company was employed by the Speedway Company to erect a speedway for the latter. The Speedway Company agreed to pay all the bills for labor and materials used in the construction, and, as compensation to the Realty Company, 10 per cent of the actual costs of such labor and materials. It is alleged that the speedway was constructed at the total cost of $577,000, and hence $57,700 became due the Realty Company, no part of which has been paid. Respondents, in presenting objections to the granting of appellant's application, did not deny the execution or performance of the contract, but set forth a subsequent contract executed in January, 1916, by the Realty Company, whereby the claim arising under the former and all other claims of the Realty Company were discharged and settled. The execution and delivery of this second document were not put in issue, nor did appellant deny that the Speedway Company had entered upon the performance of its provisions or assert that there had not been full performance. The

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here material part of the second agreement or release reads as follows:

"WE THE UNDERSIGNED, the Sperry Realty Company, by James F. Sperry, its President, and Albert A. Petit, its Secretary, duly authorized as such officers to execute this instrument, for and in consideration of certain of the capital stock of the Twin City Motor Speedway Company, which may be hereafter issued to it or James F. Sperry, its assignee, or to his associates, Henry E. L. Habighorst, Charles W. Van Orsdol or Orin Kellogg, in such amounts as the stockholders have heretofore determined and upon the conditions prescribed by said stockholders that the said Twin City Motor Speedway Company shall adjust and settle with its creditors and with the creditors of the Sperry Realty Company, with its Three Hundred and Fifty Thousand Dollars ($350,000.00) of First Mortgage Bonds and certain cash advances made by Frank H. Wheeler, James F. Sperry, Henry E. L. Habighorst and Charles W. Van Orsdol, the said Sperry Realty Company, subject to the above conditions, does hereby discharge and release the said Twin City Motor Speedway Company from any claim or liability whatsoever of any kind or description to the Sperry Realty Company for and on account of any and all contracts heretofore entered into by said Twin City Motor Speedway Company with said Sperry Realty Company for the construction of the Speedway, grandstands, fences and other construction work, which contract was awarded to the Sperry Realty Company for the consideration of costs of material furnished and labor performed, plus ten per cent (10%), and you are hereby authorized to settle with the creditors of the Sperry Realty Company direct or otherwise as you deem expedient, for any claims against this company or your company or both by reason of the construction of said Speedway" * * *.

The issue presented by the application of appellant and the objections thereto became principally one of law concerning the validity and effect of the instrument quoted from. There was therefore no violation of the rule that in applications to remove a default the merits of the claim should not be determined upon conflicting affidavits. We cannot sustain the contentions of appellant that the release is prima facie void, or fraudulent, or without consideration.

It may be noted that the sequestration proceeding in which appellant

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was appointed receiver was not instituted until many months after the execution of the second instrument or release. The record does not indicate that the creditors which appellant may now represent became such prior to the execution of the release. The document recites that the president and secretary of the Realty Company were duly authorized to execute the same, and there is nothing to suggest the contrary. Therefore the board of directors and, in all probability, all the stockholders knew about both contracts mentioned. The name of appellant's insolvent would indicate one of those small business corporations wherein all the stock is owned by the officers thereof. For aught that appears the interests of neither the creditors nor of the stockholders represented by appellant are such that he can raise any legal objections to the validity of the release.

Upon the whole record as presented we are unable to hold that there was an abuse of judicial discretion in the order under review.

Order affirmed.

CHARLES C. PRENDERGAST v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.[1]

November 9, 1917.

No. 20,556.

Negligence — proximate cause — question for jury.

The evidence on the issue of whether plaintiff's injuries were proximately caused by negligence on the part of defendant presented a question of fact for the jury.

Action in the district court for Ramsey county to recover $17,000 for injuries received while in defendant's employ. The case was tried before Brill, J., and a jury which returned a verdict for $1,750. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Barrows & Stewart, for appellant.

Douglas, Kennedy & Kennedy, for respondent.

[1]Reported in 164 N. W. 923.

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BUNN, J.

After the plaintiff had testified on the trial of this personal injury case, both parties rested. A motion of defendant to direct a verdict was denied. The jury found for plaintiff. Defendant moved for judgment notwithstanding the verdict, but not for a new trial. The motion was denied, judgment was entered on the verdict and defendant appealed therefrom to this court.

Defendant contends that the trial court should have directed a verdict, on the ground that the evidence failed to show that the injuries complained of were proximately caused by any negligence on the part of the defendant. There was no conflict in the testimony. The case made by plaintiff may be stated as follows:

Plaintiff's injuries were received while he was in the performance of his duties as a switchman in the employ of defendant. He was assisting in moving and switching a string of some 25 freight cars on track No. 5 in the yards of defendant at Grand Crossing, Wisconsin. He was standing in the space between tracks 5 and 6. He gave the signal for the cars to move and then stood observing the marks on the cars as they passed him, in order to properly switch them. Track 6 was filled with iron or steel gondola cars, which were stationary. There was a clearance of but two feet between the sides of the cars on track 6 and the sides of the cars moving on track 5. While plaintiff was standing in this position, watching the cars as they passed him, he was struck in the face by a "bunch" of wires, six or seven strands, one end of which was attached to a stake pocket on one of the moving cars. The wires were about a foot long and protruded out from the car, which was of the gondola type, something less than a foot. Plaintiff had not observed them and did not know they were there. The wires did not inflict any injury, but plaintiff was startled when they struck his face, and suddenly jumped backward, striking his back against a portion of one of the cars on track 6, causing the injuries complained of.

The wires in the "bunch" that struck plaintiff were used in staking down loads on cars where the stake pockets are outside. They were performing no service at the time, as the car was not loaded. There was evidence that these wires were customarily removed by the car in-

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spectors, who examine all trains which pull into the yards for defects and dangers.

Our opinion is that the evidence made a case for the jury. While it cannot be said that reasonable minds would all agree that defendant, in the exercise of due care for the safety of its employees, ought to have discovered this bunch of wires and removed them, it surely cannot be said that they would agree that the failure to discover and remove them was due care. It was necessary for switchmen to stand very close to the moving cars when the adjacent track was occupied, and we think reasonable men might well say that defendant ought to have anticipated that the projecting wires might strike a switchman's face as the cars passed him, and at least cause him to jump back, if not directly inflict injury. Certainly the close proximity of the cars on the adjacent track was a source of danger to a man who suddenly jumped backwards.

It is immaterial, even conceding it to be a fact, that the wires could not of themselves inflict an injury. If it can fairly be said that defendant could reasonably anticipate that an injury might be caused by them, it is not important that the precise accident that happened could not have been foreseen, or that the accident would not have happened had plaintiff not been startled by the wires striking his face. The case is materially different from those supposed by counsel for defendant, such as if plaintiff had been startled by a straw or piece of binding twine blowing into his face, or by an unexpected shout or noise.

The evidence as to a custom to inspect the cars and remove these wires, though not very definite, is uncontradicted, and sufficient, in our judgment, to sustain a finding that defendant knew or ought to have known that the wires were projecting from the car. This distinguishes the case from Murphy v. Great Northern Ry. Co. 68 Minn. 526, 71 N. W. 662, cited by defendant.

Our conclusion is that defendant was not entitled to a directed verdict or to judgment notwithstanding the verdict.

Judgment affirmed.

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GUSTAVE KAFKA v. WATSON P. DAVIDSON.[1]

November 9, 1917.

No. 20,666.

Eminent domain — division of award — question for jury.

Evidence considered and *held* sufficient to justify submitting the case to the jury.

Action in the district court for Ramsey county to recover $19,400. The case was tried before Brill, J., and a jury which returned a verdict for $1,969.97. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

B. H. Schriber, for appellant.

Durment, Moore & Oppenheimer, for respondent.

QUINN, J.

This is an action to recover damages occasioned by the condemning and taking of property for public use. The plaintiff had a verdict. From an order denying his motion for judgment or a new trial, defendant appeals.

On February 15, 1911, Archie G. Clark and others were owners in fee of the north 50 feet of lots 1 and 2, block 25, in the city of St. Paul, the same being a rectangular parcel fronting 100 feet on Fourth street and 50 feet on Robert street. There was a store room on the northeast corner of the tract having a frontage of 26 feet on Fourth street and 24 feet on Robert street. On that day the owners leased the store room to the plaintiff for a term of 6 years, 6 months and 15 days, at a rental of $165 per month. The lease provided that, in case the lessor should sell the property, or make a ground lease for a period of not less than 25 years, the lease might be canceled upon the giving of 6 months' notice and the payment of $1,500.

November 25, 1911, the owners executed a ground lease of the premises

[1]Reported in 164 N. W. 980.

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to the defendant, Davidson, for the period of 100 years, subject to existing leases with present tenants. On July 1, 1913, plaintiff's lease was so modified that it might be terminated at any time upon 60 days' notice and the payment of $1,500.

In 1913, the city widened Robert street so that it became necessary to condemn and take a strip of land 20 feet wide bordering on the west side of the street, which included the east 20 feet of the store room and the ground thereunder. It is not questioned but that the condemnation proceedings were regular in all particulars.

While the board of public works had under consideration the question of benefits and damages to property on account of such taking, plaintiff presented his claim for damages. Thereafter the board made an award of damages and assessment of benefits and allowed to the owners of the fee of the north one-half of said lots 1 and 2 $25,200 as damages, and assessed benefits thereto at $13,692, leaving the amount of $11,508 to be paid by the city as damages. There was no separate award of damages to either the plaintiff or defendant on account of the leases. The plaintiff filed objections to the disallowance of his claim for damages, upon the ground that the disallowance was arbitrary, illegal and not made in the exercise of any judgment or discretion or in pursuance or furtherance of law. Failing on his objections, he appealed to the district court where the award and assessment made by the board were affirmed. Subsequently upon certiorari the judgment of the district court was reviewed and affirmed by this court. State v. District Court of Ramsey County, 128 Minn. 432, 151 N. W. 144. The amount of the award, after deducting the assessed benefits therefrom, to-wit, the sum of $11,508, was assigned by the owners of the fee to the defendant who received the same from the city, whereupon the plaintiff brought this action to recover his proportion thereof, claiming that the award was intended to cover and did include not only the value of the property taken, but the damages to plaintiff's leasehold interest as well. The complaint contained four distinct claims, three of which were disposed of adversely to the plaintiff on a former appeal to this court, leaving only the claim for injury to the leasehold for further consideration. Kafka v. Davidson, 135 Minn. 389, 160 N. W. 1021.

While a separate award might have been made, which is frequently done

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in like matters where the proceedings are before a tribunal having capacity to inquire into the various interests, yet it is not necessary so to do in order to render the award sufficient for all intended purposes. If, as a fact, the board had under consideration, in its entirety, the property sought to be condemned, and considered the leasehold interest of plaintiff and included an allowance therefor in the award of $25,200, we see no good reason why he should not be entitled to recover in this action.

It is claimed on behalf of the appellant that the testimony conclusively shows that the plaintiff presented his claim to the board of public works; that the same was duly considered and disallowed; that the disallowance was thereafter affirmed and thereby became final and conclusive, and that there was nothing included in the award made to the owner of the fee on account of plaintiff's leasehold interest in the premises.

In submitting the case to the jury, the trial court stated: "It is not necessary that the board, in fixing the amount and in making the award of damages, should have included the plaintiff by name or had specifically before them the exact claim made by the plaintiff for his damages, but if the award was for all the interests in the property, then it would include any interest which the plaintiff had. If the award did not include the interest which the plaintiff had, then there could be no recovery in the case. If it did, then there is another question for your consideration. It is claimed on the part of the defendant that the board of public works disallowed the plaintiff's claim. This is denied by the plaintiff, and that is a question for your consideration and determination. * * * It appears that he presented a claim to the board of public works, and, as I say, there was no allowance, in terms, made to him, and there was no disallowance appearing upon the record of the board. * * * It is not necessary that there should have been a separate allowance made to him, nor is the fact conclusive that nothing appears upon the record as to whether there was an allowance or not, or that it doesn't appear from the record that there was a disallowance. The question is, whether there was in fact a disallowance of his claim * * *. The record of the board * * * does not show whether there was an allowance or a disallowance. That is to be determined * * * by the evidence in the case."

We think the case was one for the jury, that the evidence was not

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conclusive against plaintiff, and that the trial court fully and fairly submitted the issues of fact to the jury for determination.

Affirmed.

STANDARD PRINTING COMPANY v. FIDELITY & DEPOSIT COMPANY OF MARYLAND.[1]

November 16, 1917.

No. 20,403.

Liability insurance — action by employer against insurer — payment of employee's judgment.

1. When the insurer in an employer's liability policy assumes the exclusive control of the defense of a suit upon an employee's claim, it becomes liable for the payment of a judgment obtained by the employee, and an action may be maintained by the employer to recover from the insurer the amount of the judgment for the benefit of the employee without payment of the judgment.

Same — defense by insurer to action by employee.

2. Having once assumed the defense, the insurer cannot relieve itself of this measure of liability by an unwarranted withdrawal from the case.

Same — prosecution of action for benefit of employee.

3. There was no impropriety in an agreement by the employer to prosecute the suit for the benefit of the employee, nor in counsel commenting on that fact.

Same — recovery of employer's expenses.

4. Under such circumstances, the employer may recover expenses incurred in defense of the employee's action after the insured withdrew, without payment of such expenses.

Action in the district court for Hennepin county to recover $1,363.87 upon defendant's policy. The facts are stated in the opinion. The case was tried before Fish, J., who at the close of the trial denied motions for directed verdicts, and a jury which returned a verdict for $1,183. From

[1]Reported in 164 N. W. 1022.

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an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Briggs, Thygeson & Everall, for appellant.

Kerr, Fowler, Schmitt & Furber, for respondent.

HALLAM, J.

In July, 1913, plaintiff carried a liability policy in defendant company. Georgia Arabella Johnson, an employee of plaintiff, was injured in the course of her employment and sued plaintiff for damages.

The summons and complaint were turned over to defendant for attention. Defendant assumed the defense of the action and employed attorneys to that end. Its attorneys answered, interviewed witnesses, and made the usual investigation incident to a lawsuit. As the time approached for trial, two of defendant's representatives called on plaintiff's secretary for the purpose of further preparing the case for trial. A dispute arose; defendant accused plaintiff of refusing to co-operate with defendant in defending the action, and in fact accused plaintiff of assisting the employee in the prosecution of her case, and thereupon defendant, assigning such want of co-operation, withdrew from the defense of the case and notified plaintiff in writing to that effect. Plaintiff employed other attorneys and the case was tried. The employee recovered a verdict and a judgment in the sum of $963.87. Defendant refused to pay the judgment. By that time, plaintiff had become insolvent and had transferred all its assets to its principal creditor, and this creditor agreed to pay plaintiff's debts, not including this claim. No other debt or claim was outstanding. There was no recourse for the collection of this judgment from plaintiff, except by resort to stockholders' liability. It was then agreed between the judgment creditor and plaintiff that plaintiff would give its promissory note to Miss Johnson for the amount of her judgment, and that she would satisfy the judgment. It was further agreed that she should have the benefit of any recovery which plaintiff might have against the defendant under its bond. Thereupon the note was given, the judgment satisfied and this action brought on the bond. This case was submitted to a jury and a verdict was rendered for plaintiff.

The policy was in the usual form. It required defendant to defend any suit brought against plaintiff to enforce a claim covered by the bond

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and to pay the expense of the litigiation. It gave to defendant the exclusive control of the case with the right to settle or litigate as it saw fit, and denied the right of plaintiff to interfere. It required plaintiff, when requested by defendant, to aid in securing information, evidence and the attendance of witnesses, and to render all co-operation and assistance within its power. The trial court charged the jury that, if plaintiff broke this provision of its contract, defendant was justified in withdrawing from the defense and was relieved from liability on its bond, but that if plaintiff did not break its contract in this particular then plaintiff might recover. The jury by its verdict in effect found that plaintiff did not break its contract and that defendant's withdrawal from the case was wrongful or without warrant.

1. The court did not submit the question whether the transaction mentioned was a bona fide payment of the judgment. Exception was taken to its failure to do so. It may be that this question, if material, should have been submitted to the jury, but we do not think it was material. Under the rule laid down in Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, 48 L.R.A.(N.S.) 184, plaintiff might maintain this action without payment of the judgment. The policy in question in that case was the same as in this case. In that case it was held in substance that where the insurer undertakes the defense of a suit upon an employee's claim and answers and assumes exclusive control of the suit, it becomes liable for the payment of the claim when established, and the judgment establishes a debt due from the insurer to the insured, which is not dependent on any contingency, that payment of the judgment is not a condition precedent to its liability to pay, and that as to the plaintiff-employee, this debt was subject to garnishment in a suit against the insured.

If the judgment is, as to the employee, a debt due from the insurer to the insured, not dependent on any contingency, as held in the Adan case, clearly it was a debt which the insured might recover in an action for the benefit of the employee. The Adan case has been followed in other cases in this state and the same rule has been followed in some other states. Elliott v. Aetna Life Ins. Co. 100 Neb. 833, 161 N. W. 579, L.R.A. 1917C, 1061; Davies v. Maryland Casualty Co. 89 Wash.

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571, 154 Pac. 1116, 155 Pac. 1035, L.R.A. 1916D, 395, 398. We adhere to the decision in the Adan case.

2. Defendant contends that, by withdrawing from the defense of the action after it had once assumed the defense, it took itself out of the rule of the Adan case. The jury found that the conduct of defendant in withdrawing from the defense was unwarranted. Our opinion is that when defendant once assumed the defense of the personal injury action, it made an election that was irrevocable, except for cause, and that defendant could not by any unwarranted conduct on its part place itself in a better position than it would have been in had it gone ahead with the defense it had once assumed. Tighe v. Maryland Casualty Co. 218 Mass. 463, 106 N. E. 135; Compton H. L. Co. v. General A. F. & L. A. Corp. 195 Mo. App. 313, 190 S. W. 382, 385.

3. Exception is taken to the fact that evidence was received to the effect that the suit was really brought for the benefit of Miss Johnson, and that any verdict obtained by plaintiff would inure to her benefit, and to comment on that fact by plaintiff's counsel in his address to the jury. This was the transaction in fact. We see no impropriety in the transaction, for it simply gave the benefit of the insurance to the injured person, who, as stated in the Adan case, was the person it was "indirectly intended to benefit." [119 Minn. 314] We see no impropriety in proof of the real transaction nor in comment upon it on the trial.

4. Contention is made that the court erred in allowing recovery for expenses incurred by plaintiff in defending the damage suit after defendant withdrew therefrom, since there is no evidence that the expense had been paid.

A majority of the court are of the opinion that this ruling was right. The bond provides that no action shall be brought against the insurance company for expenses incurred by the assured in the defense of a suit for damages brought by an employee, unless the assured has actually made payment of such expenses. This is interwoven into the same section as the provision for similar payment of the judgment. Another section of the bond obligated the insurance company to pay "all expenses * * * incurred by the company (defendant) in defending any suit." When the company assumed control of the case it made all

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such expenses its own obligation as much as it made the liability on the claim for damages its own obligation.

Order affirmed.

WILLIAM CRONAN v. CHARLES J. WOLFE.[1]

November 16, 1917.

No. 20,463.

Judgment — estoppel by verdict.

1. A former judgment based upon an issue presented in this action *held* final and a bar to retrial thereof, though the parties in the former action were not the same as in this action.

Same — same.

2. It is sufficient to operate as an estoppel that the present parties were adversary parties in that action with respect to the precise issue and that it was determined therein upon the merits.

Counterclaim.

3. A counterclaim interposed by defendant *held* without merit.

Action in the municipal court of Minneapolis to recover $200 upon a promissory note. The case was tried before Charles L. Smith, J., who directed a verdict in favor of plaintiff for $224.38. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Latham & Pidgeon, for appellant.

Harry Rauch and *John Ott,* for respondent.

BROWN, C. J.

This action was brought in the municipal court of the city of Minneapolis to recover upon a promissory note for the sum of $200, in which a verdict was directed for plaintiff and defendant appealed from an order denying a new trial.

[1]Reported in 164 N. W. 1018.

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By his answer defendant interposed in defense to the action: (1) A set-off in the sum of $700; and (2) a counterclaim in the sum of $75. The trial court held, on the facts presented by the pleadings and evidence, that defendant had exhausted his remedy on the set-off in a former action between the same parties, and was concluded by the judgment therein, and as to the counterclaim that the facts wholly failed to show a right of recovery. Whether the court was right in so holding presents the only substantial question on the appeal. The facts as respects both the set-off and counterclaim arise out of one and the same transaction and a brief statement thereof, without going into details, will give a sufficient understanding of the case.

1. One J. H. Low owned a tract of 610 acres of land in Murray county, and had entered into a contract by which he authorized plaintiff in this action to make a sale thereof at the net price of $24,000; plaintiff to receive for his services in the event he effected a sale a commission of $700. Plaintiff thereafter made a sale of the land to defendant for the stipulated price of $24,000, and Low subsequently made a conveyance to defendant in fulfilment thereof. At some time prior to the completion of the transaction plaintiff and defendant entered into the following writing, namely:

"Minneapolis, Jan. 9, 1915.

"Agreement by and between Chas. J. Wolfe and Wm. Cronan as follows, Chas. J. Wolfe agrees to pay Wm. Cronan the sum of five hundred dollars for his share of the profit on the J. H. Low farm of 610 acres more or less in Murray Co. Minnesota. This land lays about 8 miles from Lake Wilson. The above mentioned money to be paid in case the deal is completed and exchange made, otherwise there is nothing to be paid by either party. The price of the above lands is not to exceed $24,000 in payments as agreed on between J. H. Low and Chas. J. Wolfe.

"Signed this 9th day of Jan. 1915.

"Chas. J. Wolfe,
"Wm. Cronan."

After Low had conveyed the land in performance of the sale contract, both plaintiff and defendant made claim to the commission of $700; plaintiff under the agency contract, and defendant under the writing

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above quoted. Low, while admitting his liability for the commission, declined to solve the controversy between plaintiff and defendant and refused to pay the commission to either. Plaintiff then brought suit against him in the district court of Murray county to recover the money. Upon being served with the summons in the action Low, upon an affidavit setting forth the conflicting claims of plaintiff and defendant, and expressing the willingness to pay the money to the proper party, applied to the court for an order requiring defendant herein to interplead in the action and therein present and contest his right to the money. The order was made, and in compliance therewith defendant appeared in that action and presented the identical claim now asserted in this action. Issue was joined thereon by plaintiff, and the cause proceeded to trial as a controversy between plaintiff and this defendant, resulting in a judgment against defendant, and a finding by the trial court that the facts pleaded by him as a basis for his claim to the money were not true. The facts so pleaded and litigated in that action constitute the set-off interposed by defendant in this action.

Defendant contended in the former action that the writing above set out constituted an assignment to him of the Low commission, while plaintiff claimed that the writing had no reference to that commission, but was intended to apply to a possible resale of the land by defendant, and as fixing the compensation for plaintiff's services in that behalf. The trial court, as heretofore stated, held that since the identical issue was determined in the former action, the rule of estoppel by verdict applies, barring further litigation of the issue in this action. In this it is clear, and we so hold, that the trial court was entirely right. 2 Dunnell, Minn. Dig. § 5159. It is not material that the parties were in one respect different in the former action. Plaintiff and defendant were the sole litigants in that action; defendant therein being passive and willing to abide the result of the controversy between plaintiff and the intervener. The case comes within the general rule of res judicata and the former recovery is conclusive against defendant. 2 Black, Judgments, § 504; Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263; Sheets v. Ramer, 125 Minn. 98, 101, 145 N. W. 787.

2. Before the contract of sale had been closed by the execution of a proper deed conveying the land to defendant, it was discovered that the

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son of Low was in possession of the land under a lease which did not expire for some time. Defendant, the purchaser, desired immediate possession, and it was arranged by an agreement between plaintiff and defendant that the latter should procure from the tenant a release of his leasehold interests, and that plaintiff and defendant would contribute equally to whatever amount was necessary to secure the same, not exceeding the sum of $500. Defendant made the bargain with the tenant, and agreed upon $500, for the surrender of his rights. Defendant paid his one-half of the amount, or $250; plaintiff later discharged the one-half which he assumed by the payment to the tenant of the sum of $100. This was $150 less than defendant paid, and he insists in support of his counterclaim that plaintiff is in duty bound to reimburse him to the extent of one-half of such excess, or $75. We find from the record no legal support for this claim.

Just how or by what method of persuasion plaintiff succeeded in inducing the tenant to accept $100, in discharge of plaintiff's $250 obligation does not appear. But, whatever may have been the reasons prompting the reductions, the conclusion is clear that it did not either in whole or in part enure to the benefit of defendant. Defendant made the bargain with the tenant and liability for the amount agreed upon was divided equally between plaintiff and defendant. As between them there was no joint obligation. It was wholly several, and the payment by one of the share apportioned to him would operate as a discharge of further obligation to the other. There existed no fiduciary relations between the parties, in respect to this matter, and plaintiff violated no duty he owed defendant in effecting a discharge of his obligation at a substantial discount. Whether he should pay the full amount or something less, was a matter between the tenant and plaintiff. Defendant is in no position to complain. The court was therefore correct in holding that the counterclaim was without foundation in law.

Order affirmed.

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A. G. OTTO v. DULUTH STREET RAILWAY COMPANY.[1]

November 16, 1917.

No. 20,528.

Workmen's Compensation Act — plaintiff's remedy not under the statute.

1. Defendant and plaintiff's employer were both under the Workmen's Compensation Act, when plaintiff suffered the injuries sued for, through the alleged negligence of defendant. Defendant's defense, that plaintiff's sole remedy is compensation under the act, was rightly *held* not made out; for it conclusively appeared that the accident, causing the injury, did not take place during the hours of plaintiff's service, nor upon the premises where the services were being performed or where his service required his presence at the time of the injury.

Contributory negligence.

2. The defense of contributory negligence was for the jury.

Street railway — care in operation of cars — charge to jury.

3. In view of the specific charge that plaintiff was bound to use his senses to avoid collisions when crossing street car tracks, it cannot be said to be prejudicial error to instruct the jury that plaintiff had a right to rely upon defendant not operating its car negligently; for it was immediately followed by the statement that those operating the street cars had a right to assume that persons about to cross the car tracks would exercise ordinary care for their own safety.

Reduced verdict sustained.

4. The verdict as reduced, though seemingly large, should not be disturbed by this court.

Action in the district court for St. Louis county to recover $18,000 for injuries received in collision between the automobile in which plaintiff was riding and one of defendant's street cars. The case was tried before Cant, J., and a jury which returned a verdict for $6,000. From an order denying its motion for judgment notwithstanding the verdict and

[1]Reported in 164 N. W. 1020.

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granting a new trial unless plaintiff consented to a reduction of the verdict to $4,500, defendant appealed. Affirmed.

Thomas S. Wood and *G. A. E. Finlayson,* for appellant.

Jones & Forbes and *A. G. McKnight,* for respondent.

HOLT, J.

Plaintiff recovered a verdict of $6,000 for personal injuries received when a street car, operated by defendant in the city of Duluth, collided with an automobile driven by him. A blended motion for judgment notwithstanding the verdict or a new trial was denied, on condition that plaintiff consent to a reduction of the verdict to $4,500. The consent was given. Defendant appeals.

1. The main contention of defendant here is, that the evidence conclusively established that plaintiff's only remedy for the injuries sustained was a proceeding against his employer under the Workmen's Compensation Act. The trial court entertained the opposite view, and held that the evidence was insufficient to carry this defense to the jury.

The facts are these: Plaintiff was in the employ of the Duluth Edison Electric Company, as a "trouble man," that is, when on duty he went as soon as notified to any place on the system where the service which his employer was giving its patrons was interrupted to remedy or restore it. He had been in the employ many years. At the time in question his salary was $100 per month for certain stated hours of work each day, namely from 9 a. m. to 6 p. m. But he could be called, and was frequently called, to do extra night work. When so called he received one and one-half of the usual pay for the time spent on duty. The company furnished him with a Ford runabout to use in his work. This automobile, when not in use, was kept in a garage provided by the company. Plaintiff, when off duty, used this machine for his own purposes whenever he wished, without any objection being made by his employer. Defendant as well as plaintiff's employer are under the Workmen's Compensation Law. Before quitting time on July 10, 1916, plaintiff reminded his foreman that the employee whose turn it was to care for the "trouble" that night was ill and might not be able to come. Thereupon the foreman requested plaintiff to come back after supper and take the place of the ailing man. Plaintiff answered that he could not well

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do this, for he had planned to go out with his wife that evening. The foreman insisted that he return or see that some other person take charge of the "troubles" that night. At 6 o'clock, the regular quitting time, plaintiff took the automobile to drive to his home for supper. He drove north on Second avenue east, and as he approached Second street an east-bound street car was receiving or discharging passengers at the intersection. This car started up about the time plaintiff entered the crossing, and he proceeded to cross Second street. At this moment a west-bound car approached rapidly. There is quite a down grade going west from Third avenue east to Second avenue east. The street car was beyond control of the motorman and struck the automobile, throwing plaintiff out and inflicting severe injuries. The question is, was plaintiff in the course of his employment at the time of the accident?

We think it clearly appears that he had completed his regular work, and had not entered upon the extra work which he was to perform that night. The burden was upon defendant to prove that plaintiff was performing work for his master at the time the accident happened. There was no evidence that he was to receive pay for the time occupied in going to and returning from his supper. The statute leaves little room for doubt or argument on the question before us, for it provides that the phrase "personal injuries arising out of and in the course of employment" shall be held "not to cover workmen except while engaged in, on or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Section 8230, subd. (i), G. S. 1913. The injury did not take place during the hours of plaintiff's service. He had completed the hours of his regular everyday service, and he had not begun the hours of his extra service. The time was then plaintiff's, used for his own purposes. The employer had no control over him until his return. Morier v. St. Paul, M. & M. Ry. Co. 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A. (N.S.) 598; Edwards v. Wingham A. I. Co. 6 B. W. C. C. 511.

The Wisconsin Workmen's Compensation Act [Wis. St. 1915], § 2394-3 provides: "Every employee going to and from his employment, in the ordinary and usual way, while on the premises of his employer, shall

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be deemed to be performing service growing out of and incidental to his employment." The court, in Hornburg v. Morris, 163 Wis. 31, 157 N. W. 556, held that a fireman, while returning from his dinner, was not in the employ of the city so as to have a claim under the act for compensation for injuries suffered in an accidental collision on the way.

The authorities cited and relied on by appellant do not seem to be in point. In Wallin v. Eastern Ry. Co. 83 Minn. 149, 86 N. W. 76, 54 L.R.A. 481, the negligent act causing the injury occurred during the time of the employment, for such time included going to and returning from the place of work. So in Kuehmichel v. Western Union Tel. Co. 125 Minn. 74, 145 N. W. 788, the messenger who caused the injury began his service for the master when he started on his way to the office at the command of his superior. In Mahowald v. Thompson-Starrett Co. 134 Minn. 113, 158 N. W. 913, 159 N. W. 565, the servant was engaged in his work in the proper place at the time of the accident. In re Sundine, 218 Mass. 1, 105 N. E. 433, L.R.A. 1916A, 318, the injury was received upon the premises of the employer. The same in effect was the case in Moore v. Manchester Lines, 3 B. W. C. C. 527, Zabriskie v. Erie R. Co. 86 N. J. Law, 266, 92 Atl. 385, L.R.A. 1916A, 315, and like cases, rightly hold that where the toilet facilities are so placed that employees must cross a public street in order to reach them from their place of work, they are within the protection of the compensation act while crossing the street for the purpose of going to the toilets.

2. The jury might well conclude that the noise of the Ford, in low gear, and the obstruction of the east-bound street car prevented plaintiff from hearing or seeing the west-bound car until too late to avoid the accident. The issue of contributory negligence was properly submitted to the jury, and their decision cannot be disturbed on this record. At the trial defendant conceded that its street car was not under control. And the evidence clearly established defendant's negligence.

3. The trial court's instruction to the jury, that plaintiff "had a right to rely upon the west-bound street car not being operated negligently and not rushing past the crossing without slowing up," should be considered with the next sentence in the charge, which is: "In the same connection, the street car men also had a right to assume that anyone approaching

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the street railway tracks would also be in the exercise of ordinary care for his safety." The court had previously told the jury that "a man about to cross a street railway track has to exercise a degree of prudence for his own safety commensurate in some fair degree with the dangers which may reasonably be apprehended at that point. One may not blindly go upon a street railway track in the immediate face of an approaching car which he sees, or should have seen, and then claim that he is entitled to compensation for injuries which he may under such circumstances sustain." And also gave this instruction at the request of defendant: "You are instructed that it is, ordinarily, the duty of one driving an automobile when he approaches an intersection and is about to cross a street on which there are double tracks of a street railway company, to look and listen for the approach of cars in either direction. It is only under exceptional circumstances that the traveler is relieved of this duty, and he cannot in any case wholly omit the duty of looking and listening, simply because he hears none of the customary or required signals of the approach of the car."

These instructions, taken together, do not import that plaintiff could wholly rely upon the assumption that defendant would not be negligent. They are practically in line with Pogue v. Great Northern Ry. Co. 127 Minn. 79, 148 N. W. 889, and required plaintiff to use his senses diligently for his own safety if he were to escape the consequences of the contributory negligence rule.

4. The verdict, as reduced, seems large for the injury sustained. There is, however, evidence supporting the finding of permanent disability to pursue his vocation wherein he had been able to earn from $100 to $150 per month. The trial court had better opportunity to observe plaintiff's condition as to the impaired movements of the arm than we have, and we do not think the record warrants us in concluding that the damages awarded by the jury were so excessive as to necessitate a new trial or that the amount now fixed should be further reduced.

The order is affirmed.

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STATE v. M. A. HATCH.[1]

November 16, 1917.

No. 20,537.

Trial — conflict of testimony — charge to jury.

1. A statement in a charge to the jury, that the testimony is squarely in conflict and that some of the witnesses have committed perjury, but that it is for the jury to say who is to be believed, is not an erroneous charge.

Miscarriage — when not manslaughter — danger of death.

2. General Statutes 1913, § 8610, makes the procurement of a miscarriage resulting in death, manslaughter, "unless the same is necessary to preserve * * * life." In order to bring a case within the exception it is not necessary that the danger of death be immediate.

Same — charge to jury.

3. An instruction that to bring a case within the exception the danger of death must be immediate, is not, however, erroneous, where the defense is predicated on the existence of immediate danger to life.

Defendant was indicted by the grand jury for the crime of manslaughter, tried in the district court for Hennepin county before Jelley, J., and a jury which found defendant guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Donald G. Hughes and *Charles B. Elliott,* for appellant.

Lyndon A. Smith, Attorney General, *John M. Rees,* County Attorney, and *Walter H. Newton,* First Assistant County Attorney, for respondent.

HALLAM, J.

Defendant was convicted of manslaughter under G. S. 1913, § 8610, which reads as follows:

"Every person who shall wilfully kill an unborn quick child by any injury inflicted upon the person of its mother * * * or who shall use or

[1]Reported in 164 N. W. 1017.

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employ * * * any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, and the death of the woman, or that of any quick child of which she is pregnant, is thereby produced, shall be guilty of manslaughter in the first degree."

Defendant is a physician and surgeon. He had seen fit to engage in a branch of practice which consisted largely in the treatment of women who desired to be relieved from pregnancy with the purpose of bringing such relief by abortion where the case was "perfectly legitimate" and the patient "needed to be operated upon." He testified that since he had had some "trouble" and "paper publicity" in such cases, patients of that kind had come to him "almost in droves." His office attendant testified that more patients came than they had room for and that letters came in "sometimes a bushel a day." It was admitted that defendant procured the miscarriage of one of these patients, Louise Halvorson, a woman two months pregnant and that her death resulted soon thereafter. The defense was that the miscarriage which produced her death was "necessary to preserve her life." The jury rejected this theory and no question is raised but that the evidence is abundantly sufficient to support this verdict.

There are but two assignments of error. Both relate to the charge of the court to the jury.

1. The court told the jury this:

"You realize as well as the court does, that certain of the witnesses who have testified in this case have not told the truth, and in doing so they have not made an honest mistake for which they can be excused, but they have knowingly testified falsely, they have intentionally, wilfully and purposely committed perjury, in direct violation of their sworn oaths as witnesses. You cannot believe all of them, you must disbelieve some of them, but it is for you to say whom you will believe, whom you will disbelieve, and reconciling the testimony where it differs and harmonizing it where it conflicts, sift out the truth, as you find and believe it to be and return your verdict upon that and that alone."

Defendant contends that it was inevitable that the jury should infer that the court had in mind the defendant's witnesses when he referred to certain of the witnesses as having testified falsely. No such inference

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was possible. The evidence was, on some points, in irreconcilable conflict. We see no objection to the court's calling attention to that fact. In no way did the court intimate his opinion as to which set of witnesses testified falsely. There was no error in this part of the charge.

2. The court charged the jury as follows:

"Gentlemen, all of the evidence of the case bearing upon the question as to whether or not it was necessary to cause Louise Halvorson to miscarry to preserve her life is before you. And in that connection, gentlemen, you are instructed in regard to the question of the necessity of the miscarriage to preserve the life of Louise Halvorson, that what is meant by that term was the immediate preservation of her life, not a future, indefinite danger arising at some distant time through childbirth. The question is and then was, not whether Louise Halvorson was in such a condition of health when she called upon Doctor Hatch by reason of being pregnant, that if permitted to go her full period, she would or might die in giving birth to the child with which she was then pregnant, and that, therefore, at the time of her call, it was necessary to produce her miscarriage, but was it necessary to produce her miscarriage, to perform the operation then and there and when he did, to immediately preserve her life? That is the question for you to determine from the evidence, gentlemen, as to that phase of the case."

This charge, in the abstract, was not correct. The statute excepts from its operation, cases where a miscarriage is necessary to preserve life. The statute does not say that in order to bring a case within the exception, the danger of death must be immediate, and it should not be so construed.

3. It does not follow, however, that this language of the charge was reversible error. We think it was not. The claim of the defense on the trial was, not that the miscarriage was produced because of any expected danger of death at childbirth, or at any remote time, but because of a danger that was immediate: This theory of the case is manifest throughout the record. The evidence of defendant himself makes it clear that the danger to life, on which he relied, was an immediate danger. This being the claim and theory of the defense, an instruction that the danger must be immediate in order to constitute a defense could not prejudice the defendant.

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Defendant's counsel calls attention to some evidence of the defendant to the effect that deceased would have found childbirth a serious matter. He said she was 35 years of age, that she had "a flat chest" and was "pale." He gave this further testimony; "She was small boned and of an age when it would be almost impossible for her to have a normal child at nine months because she had never had a child, and when a woman dosen't have a child until she is 35 years of age it is a pretty serious matter under any condition, but with a woman who is small boned, rather close built and the bones thoroughly hardened as they are then, and in a run-down condition, poor and rather weak, and by the way I examined her heart and found it was weak, it makes an extremely serious matter of it."

As above indicated, we think a condition might arise before the end of pregnancy where the danger from childbirth could fairly be considered so grave as to warrant the procurement of a miscarriage in order to save life, but clearly the statute was not designed to legitimize abortion under any such state of facts as above detailed. Any such construction of the exception contained in this statute would inevitably lead to great abuses.

But as above stated, the defendant did not on the trial in district court claim that this miscarriage was procured because of any prospective danger to deceased at childbirth. On the contrary, he himself testified that his diagnosis was that there never could be a childbirth, that the foetus was dead, that it had become infected, was disintegrating, putrefying and rotten; that there was the beginning of septicemia; that by reason of these conditions the patient had temperature; that it was absolutely necessary to remove the foetus at once; that the condition of the patient was "critical" and that was the reason he performed the operation; that after he removed the foetus he discovered facts that corroborated his diagnosis and indicated that the foetus was dead and was beginning to decay. He stated in one part of his testimony "in a case like this where there is reason to suppose that it is putrefying, where there is temperature, it is absolutely necessary to remove it, it has got to be done." It was doubtless because of this theory of the defense that the attorneys who represented defendant on the trial took no exception to this instruction at the trial, nor in their motion for a new trial, that no objection was raised to it until after the motion for a new trial

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had been denied and other counsel who had not participated in the trial had been called into the case.

We think there was no prejudicial error in the charge.

Order affirmed.

STATE v. STEVE ATANOSOFF.[1]

November 16, 1917.

No. 20,546.

Appeal and error — settlement of case — order not appealable.

1. An order denying a motion to settle a case is not appealable, nor is it reviewable on appeal from the order denying a new trial. Mandamus is the remedy.

Same — challenge to grand jury — when not reviewable.

2. In the absence of a certification under the statute, or a case or bill of exceptions, a ruling on a challenge to the grand jury cannot be reviewed; nor without a case or bill of exceptions can rulings at the trial or the sufficiency of the evidence be considered.

Defendant was indicted by the grand jury for the crime of murder in the first degree, tried in the district court for Itasca county before Wright, J., and a jury which found defendant guilty of murder in the second degree. From an order denying his motion to settle a case and for a new trial, defendant appealed. Affirmed.

R. A. McOuat, for appellant.

Lyndon A. Smith, Attorney General, *James E. Markham,* Assistant Attorney General, and *Ralph A. Stone,* County Attorney, for respondent.

DIBELL, C.

The defendant was convicted of murder in the second degree and appeals from the order denying his motion to settle a case and his motion for a new trial.

1. There is no settled case nor bill of exceptions. The court denied

[1]Reported in 164 N. W. 1011.

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the defendant's motion to settle his proposed case. The order denying the motion is not appealable nor is it reviewable on the appeal from the order denying the motion for a new trial. Mandamus is the remedy. 1 Dunnell, Minn. Dig. § 1383, et seq; Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270; Schumann v. Mark, 35 Minn. 379, 28 N. W. 927; State v. MacDonald, 30 Minn. 98, 14 N.W. 459; State v. Cox, 26 Minn. 214, 2 N. W. 494.

2. In the absence of a certification under the statute, or a bill of exceptions or settled case, a ruling on a challenge to the grand jury cannot be reviewed; nor without a case or bill of exceptions can rulings at the trial or the sufficiency of the evidence to sustain the verdict be considered. See G. S. 1913, § 9251; 1 Dunnell, Minn. Dig. & 1916 Supp. §§ 342-350, 1368, 1369, 2493, and cases cited. This is the character of the objections urged by the appellant.

So far as the appeal is directed to the order denying the defendant's motion to settle a case it is dismissed. So far as the order denies a new trial it is affirmed.

Order affirmed.

JOHANNA KROSCHEL v. HENRIETTA DRUSCH.[1]

November 16, 1917.

No. 20,550.

Will — undue influence — finding sustained by evidence.

1. Will contest. The evidence sustains the finding of the trial court that the will was not procured by undue influence.

Same — definition of attestation.

2. Attestation is the act of witnessing the execution of an instrument and subscribing the name of the witness in testimony of such fact.

Same — knowledge of witnesses.

3. It is not necessary that attestation be formally requested by the testator. Whether it is necessary that the witnesses should know that the document is a will is not decided.

[1]Reported in 164 N. W. 1023.

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Same — finding of attestation — evidence sufficient.

4. There is evidence that when one of the witnesses was called, he was told that he was to witness a testament, that he saw the testator and the other witness sign, and was told, in the conscious presence of the testator and within his hearing, that the instrument was the testator's will and he was asked to sign it as a witness, and that he then did so. This evidence was sufficient to sustain a finding of attestation under any definition of that term.

Johanna Kroschel petitioned the probate court for Brown county for the allowance of the last will and testament of Leo Drusch, deceased. Henrietta Drusch filed objections to the allowance of the will. From the order of the probate court denying the application for probate, Johanna Kroschel appealed to the district court for that county. The appeal was heard before Olsen, J., who made findings and reversed the judgment of the probate court. From the order of reversal Henrietta Drusch appealed. Affirmed.

Alfred W. Mueller, for appellant.

Albert Hauser, for respondent.

HALLAM, J.

Leo Drusch was an unmarried man of middle age. He had for some years employed his time either renting farms or working on farms for hire and had accumulated above $3,000 worth of property. He had a small house in Sleepy Eye. His mother, nearly 75 years old, lived in this house, and Drusch made his home there when not at work. His other relatives were a sister, Mrs. Kroschel, a woman of some means and married to a wealthy farmer, a brother, Albert, and seven children of a deceased sister. In June, 1916, Drusch discovered that he had an incurable disease. While in a hospital at Springfield, he himself wrote out a document which he supposed would direct the disposition of his property after his death. By its terms he indicated a wish that his mother inherit all his property. Later, and on July 6, Drusch was taken to his home in Sleepy Eye. His mother was there and his sister was there much of the time. On July 10 Mrs. Kroschel and her husband went to the office of Mr. Hauser, a lawyer in Sleepy Eye, and told him Drusch wanted a will drawn. Hauser asked if they knew the terms and was told he

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wanted to leave his property to his mother for life with remainder to Mrs. Kroschel. Hauser drew the will accordingly and took it to the Drusch home. There is evidence that Hauser fully explained the will to Drusch in the presence of his mother and the Kroschels and that Drusch said that was the way he wanted it. Hauser then told them that another witness was needed. Some one suggested a neighbor, Mr. Zimmermann, and he was called. All being present, Drusch, sitting up in bed, signed the will and Hauser and Zimmerman signed as witnesses. Testator's mother contested the will. The trial court sustained the will. Contestant appealed.

1. It is conceded that deceased had sufficient mental capacity to make a will. Claim is made that the will was procured by undue influence exerted by Mrs. Kroschel and her husband. The trial court found that it was not. Undue influence which will avoid a will must be influence so exercised as to destroy the free agency of the testator and control the disposition of the property. In re Timothy Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. 665. The contested will evidenced a change of purpose on the part of deceased, the effect of which was to enlarge the rights of his sister, to diminish the interest of his mother and to cut off his brother and his deceased sister's children from all enjoyment of his property, even after his mother's death. It is true that the sister and her husband were much with deceased, and called the lawyer who drew the will and the witnesses who witnessed it. On the other hand, there is evidence, from which the court might find that the mother was acquainted with what was going on and acquiesced. There is also evidence that deceased had an intelligent purpose of placing his property beyond the reach of his brother. The evidence that there was any undue influence is entirely circumstantial and by no means conclusive. The finding of the trial court on this point is sustained.

2. A more serious question is the question whether the will was attested as required by law. The statute requires that a will must be "attested and subscribed in his presence by two or more competent witnesses." G. S. 1913, § 7250. This will was properly subscribed by the two witnesses but was it "attested" by them? The trial court found that it was. No question is raised as to the sufficiency of the attestation so far

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as Hauser is concerned. The contention is that there was no attestation by Zimmermann.

Attestation is the act of witnessing the execution of an instrument and subscribing the name of the witness in testimony of such fact. 4 Cyc. 888; Burrill, L. Dict. International Trust Co. v. Anthony, 45 Colo. 474, 101 Pac. 781, 22 L.R.A.(N.S.) 1002, 16 Ann. Cas. 1087; 6 C. J. 553; White & Co. v. Magarahan, 87 Ga. 217, 219, 13 S. E. 509. "To constitute a legal and valid attestation the testator must either sign the will in the presence of the witnesses, or acknowledge his signature to them, or in some other way clearly and unequivocally indicate to them that he has signed and executed the same." Tobin v. Haack, 79 Minn. 101, 107, 81 N. W. 758, 761.

2. It is not necessary that the attestation be formally requested by the testator. Under the statute, no request is required. In re Allen's Will, 25 Minn. 39. Whether it is necessary that the witnesses should know that the document is a will, is a question upon which courts differ. Since attestation is generally regulated by statute, apparent differences in judicial opinions are in some cases due to variations in language of statutes. The greater number of cases arising under statutes like our own are to the effect that there may be an attestation of the execution of a will, though the attesting witnesses do not know its contents and do not know that it is a will. Thompson v. Thompson, 49 Neb. 157, 68 N. W. 372; Steele v. Marble, 221 Mass. 485, 109 N. E. 357; Thomas v. English, 180 Mo. App. 358, 167 S. W. 1147; In re Claflin's Will, 75 Vt. 19, 52 Atl. 1053, 58 L.R.A. 261; In re Lillibridge's Estate, 221 Pa. St. 5, 69 Atl. 1121, 128 Am. St. 723; Herring v. Watson, 182 Ind. 374, 105 N. E. 900; Nixon v. Snellbaker, 155 Iowa, 390, 136 N. W. 223; Allen v. Griffin, 69 Wis. 529, 35 N. W. 21; In re Silva's Estate, 169 Cal. 116, 145 Pac. 1015; 1 Schouler, Wills, 323, 326. In Tobin v. Haack, 79 Minn. 101, 106, 81 N. W. 758, 761, this court quoted this definition of attestation, taken from Swift v. Wiley, 1 B. Mon. 114, 117. "To attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication," but it cannot be said that in the Tobin case the court decided the precise question whether disclosure of the nature of the instrument was necessary. It is not necessary to decide that question in this case, since if

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disclosure of the nature of the instrument is necessary, there is evidence from which the court might have found that such disclosure was made.

4. No great formality is required. Such transactions are usually quite informal. Under a statute which required that the testator should declare his will in the presence of witneses, it was held that, when enough is said or done in the presence and with the knowledge of the testator to give the witnesses to understand distinctly that the testator desires them to know that the paper produced is his will, which they are to attest as such, the statute is sufficiently complied with. Darnell v. Buzby, 50 N. J. Eq. 725, 26 Atl. 676. There is evidence that when Mr. Zimmermann was called in he was told that he was to witness "a testament," that he saw the testator sign the will and saw the other witness sign, and was then told, in the conscious presence of the testator and within his hearing, that the instrument was the testator's will and he was asked to sign it as a witness, and that the testator said nothing in dissent and apparently acquiesced. We think this was sufficient to sustain a finding of attestation, under any construction of that term.

Judgment affirmed.

STATE EX REL. DANIEL MILLER v. DISTRICT COURT OF HENNEPIN COUNTY AND ANOTHER.[1]

November 16, 1917.

No. 20,593.

Workmen's Compensation Act — accident arising out of course of employment.

A messenger boy, who in performing his duties traverses the streets of a city, departs from the scope of his employment when he climbs upon a passing vehicle, not owned or controlled by his employer, for the purpose of expediting his work, so that an accident which befalls him when upon such vehicle cannot be said to arise out of and in the course of his employment under the Workmen's Compensation Act.

[1]Reported in 164 N. W. 1012.

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Upon the relation of Daniel Miller the supreme court granted its writ of certiorari directed to the district court of Hennepin county and the Honorable John H. Steele, one of the judges thereof, to review the proceedings in that court under the Workmen's Compensation Act brought by relator, as employee, against The Journal Printing Company, as employer. Affirmed.

W. H. McGrath and *B. W. Wilder,* for relator.

K. A. Campbell and *B. Burness,* for respondent.

HOLT, J.

Certiorari to review a judgment dismissing a proceeding under the Workmen's Compensation Act. The judgment recites that, when the cause came on for hearing, defendant's motion to dismiss was granted, on the ground that the matter alleged in plaintiff's complaint showed on its face that the accident, on account of which compensation was sought, did not arise out of or in the course of plaintiff's employment. The facts stated in the complaint are in substance these: Plaintiff, 17 years old, was in the employ of defendant as a messenger at $7 per week. In this work he was provided with car fare when the distance to carry the message was considerable, but not when the distance was as short as the one from defendant's place of business to the Shubert Theater, or five blocks. On November 20, 1916, at 3 o'clock in the afternoon, plaintiff, who had been sent by an employee of defendant, having authority to do so, to the Shubert Theater for tickets, was returning with them to defendant's office. It is alleged that plaintiff was unusually busy that day and, in his haste to return to the office to continue his duties, he climbed upon an automobile truck which was proceeding in that direction, and, while so riding, he slipped on a roller upon the floor of the truck, became entangled in the gears thereof and was severely injured. Upon the hearing of the motion, it was conceded that the truck was not the property of defendant or under its control.

No doubt the facts alleged show that the accident happened while plaintiff was in the course of his employment. But it must also appear that it arose out of the same. It must grow out of it or be incidental thereto. State v. District Court of St. Louis County, 129 Minn. 176, 151 N. W. 912; Mahowald v. Thompson-Starrett Co. 134 Minn. 113,

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117, 158 N. W. 913, 159 N. W. 565; State v. District Court, 138 Minn. 131, 164 N. W. 585. This definition of the phrase "arising out of the employment," often quoted with approbation, is by Chief Justice Rugg in McNicol's Case, 215 Mass. 497, 102 N. E. 697, L.R.A. 1916A, 306:

"It (the injury) 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The majority of the court are of the opinion that plaintiff's employment was such that reasonable men could not conclude that, as an incident thereto, it might be expected that the hazard of accidental injury from obtaining rides on passing vehicles was connected therewith. It it thought that since plaintiff was provided with carfare when the messages were to go beyond a certain distance, he was to walk on all other occasions, and, therefore, when he sought other methods by which to accomplish his tasks, he departed from the scope or ambit of his employment, and while so doing was not protected by the compensation act.

The writer dissents from this conclusion and the disposition accordingly made of the appeal herein. The statute contemplates findings to be made after hearing of testimony, or, perhaps, upon stipulated facts. Whether an accident arises out of and in the course of an employment is ordinarily the ultimate decisive question of fact, to be determined upon a consideration of various facts and circumstances and the infer-

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ences to be drawn therefrom. It seems to me that the allegations of the complaint herein are broad enough to admit proof which would warrant a finding that the accident arose out of the employment. It is entirely possible that, had testimony been received, it would have appeared that plaintiff was required at all times to carry messages over and along crowded streets; that he had to proceed with dispatch; that no order had been given him how to cover the ground; that his work was such, at the time in question, that he had to be back quickly; that messenger lads usually avail themselves of such "lifts" as they may be able to obtain from vehicles on the streets. And it is conceivable that, from such testimony, reasonable men might well conclude that one of the hazards of a messenger in defendant's employ was from accidents upon vehicles which he might ride, or be permitted to ride on his errands. In other words, that the accident was attributable to the peculiar liability to street risks inherent in the employment. Beaudry v. Watkins, 191 Mich. 445, 158 N. W. 16, L.R.A. 1916F, 576; Kunze v. Detroit Shade Tree Co. 192 Mich. 435, 158 N. W. 851, L.R.A. 1917A, 252. I concede that employers of messenger boys may limit the scope or sphere of the employment. And a departure from such limit might constitute an added risk for which compensation could not be had under the law. But in this case there may not have been any restriction. Defendant may even have known and acquiesced in the method adopted by plaintiff in dispatching its business. If plaintiff availed himself of the opportunity to ride on passing vehicles, with the knowledge and assent of defendant, his so doing could not be considered an added risk. Mann v. Glastonbury Knitting Co. 90 Conn. 116, 96 Atl. 368, L.R.A. 1916D, 86. In the absence of proof and finding, it should not be assumed that plaintiff, in getting on this truck, did a wrongful act or turned aside from the employment to serve his own purpose so as thereby to place himself outside the pale of the act, as was held in Brice v. Edward Lloyd Ltd. 2 B. W. C. C. 26; Spooner v. Detroit Saturday Night Co. 187 Mich. 125, 153 N. W. 657, L.R.A. 1916A, 17. If the employees in certain vocations ordinarily pursue some customary method of doing their work, the risks or hazards connected with the method thus pursued grow out of, or become incident or peculiar to, those vocations. And does not ordinary observation convince us that the customary method pursued by messenger

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lads of 17 years, and younger, in performing their work upon the streets of a city is to avail themselves of a ride on the way afforded by the opportunity of boarding passing vehicles? That this may be a negligent method of doing the work does not affect the right to be compensated for accidental injuries under this law. I therefore think the court should not have dismissed the case, but should have heard the evidence and made proper findings, the controlling one of which would have been whether or not the accident which caused the injury arose out of and in the course of plaintiff's employment.

But for the reason first above stated the decision of the learned trial court must be sustained.

Judgment affirmed.

NATIONAL COUNCIL OF KNIGHTS AND LADIES OF SECURITY v. SARAH SILVER.[1]

November 16, 1917.

No. 20,608.

Judgment — correcting erroneous entry.

1. Where the clerk of the court by mistake enters a judgment other than that ordered by the judge, the mistake should be corrected and a judgment entered determining the case as the court ordered it determined.

Same — when correction can be made.

2. Such correction may be made after the time for appeal has expired.

Same — when correction is a matter of right.

3. In general, the allowance of amendments is within the discretion of the trial court, but where the mistake is conceded, where it is material, where the judgment is unexecuted, and the parties are still in statu quo and the rights of no third parties have intervened, the parties are entitled to a correction as a matter of right, and it is the duty of the court to make the correction. Mere delay does not bar the right.

[1]Reported in 164 N. W. 1013.

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Same — where party is given an alternative.

4. Where the findings order a judgment giving one party an alternative, such party need not indicate his choice of alternatives until the judgment is entered.

Same — no estoppel.

5. The fact that an application asking the judge to change his judicial opinion is denied because made too late, does not bar a subsequent application to correct a mistake.

Action in the district court for Ramsey county to cancel a benefit certificate or to determine the amount due and direct payment thereof. Among other matters the answer alleged that plaintiff refused to permit defendant to pay any assessments or dues. The case was tried before Kelly, J., who made findings and ordered judgment in favor of defendant. Plaintiff's motion for amended findings was granted. The substance of the order granting the motion is found in the opinion. Plaintiff moved to vacate the form of judgment signed by the deputy clerk of court and enter judgment in conformity with the amended findings. Plaintiff obtained an order requiring defendant to show cause why the motion should not be granted. From an order denying this motion, plaintiff appealed. Reversed.

William G. White, for appellant.

A. J. Hertz and *James E. Markham,* for respondent.

HALLAM, J.

Defendant was a member of plaintiff society. Plaintiff brought action to have defendant declared expelled from the society, but, if the court should determine that defendant was still a member, then to require defendant to pay certain back assessments and dues on penalty of forfeiture of her membership in case of nonpayment. After a trial without a jury, the court found that plaintiff was entitled to no relief. On June 5, 1916, the court made additional findings, finding as a fact that assessments from February, 1910, were unpaid because plaintiff had refused to receive them, and as a conclusion of law found and ordered that "the decree will direct that whenever the plaintiff in this action shall file therein and serve upon the attorney for the defendant a written statement that it will accept payment of said assessments the defendant

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within a reasonable time thereafter shall pay said assessments," and that if plaintiff shall file such statement the court will on application fix the time within which the same shall be paid and on default thereof plaintiff shall be entitled to judgment that the beneficiary certificate is null and void.

A motion for a new trial was made and denied.

Defendant's attorney served notice that on July 6, 1916, he would apply to the clerk to have defendant's bill of costs "taxed and inserted in the judgment then and there to be entered herein." At the time so fixed the costs were taxed and a deputy clerk of the court, using a blank form, prepared a form of judgment, ignoring the amended findings and adjudging simply "that the plaintiff herein take nothing by said action and that the defendant herein have and recover of said plaintiff" the sum of $12.50 costs. This was signed in the name of the clerk of the court by a deputy clerk and was indorsed as "filed this 6th day of July A. D. 1916." This document was placed in the envelope containing the files of the case. It was never noted in the civil register as having been filed. It is the practice in Ramsey county that, in actions tried by the court without a jury, judgment is not entered until the form thereof is approved by a judge of the court. This form was never approved. No judgment was ever entered in the judgment book and no judgment roll was ever made up.

In July, 1917, plaintiff asked that this document be stricken from the files on the ground that it was not in fact a judgment, and asked as alternative relief that, if it be held to be a judgment, it be amended to conform to the decision of the court. Defendant claims that the document is a real judgment and that, since the time for appeal has expired, it cannot now be amended. The court denied plaintiff's motions and plaintiff appeals.

1. We do not wish to be understood as holding that this document is in fact the judgment of the court. But, whatever it may be, it is not the judgment the court determined upon. Its existence is due to a palpable mistake and a proper judgment should be entered determining the case, as the court after a trial, deliberately ordered it determined.

2. The mistake made was not one due to any error of judgment of the judge. It was a mistake of fact of the clerk. The contention of the

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defendant is that, after the time for appeal has expired, the mistakes of the clerk must prevail over the judgment of the judge. We can see that such a rule must involve serious consequences. Suppose in an action on a money demand the clerk makes the mistake of omitting one or two figures or ciphers, or in an action to determine the title to land he omits a description. If defendant's rule is right all such mistakes are, after six months, beyond recall.

The correction of mistakes so that the determination made by the court shall become effective is always within the power of the court. The power to make such corrections does not expire with the termination of the right of appeal. McClure v. Bruck, 43 Minn. 305, 45 N. W. 438; Chase v. Whitten, 62 Minn. 498, 65 N. W. 84; Wright v. Krabbenhoft, 104 Minn. 460, 462, 116 N. W. 940; Schloss v. Lennon, 123 Minn. 420, 422, 144 N. W. 148; Hiawatha Tp. v. Circuit Judge, 90 Mich. 270, 51 N. W. 282; Dickey v. Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. 321; 1 Black, Judgments, (2d ed.) § 156. Such errors are not corrected by an appellate court on appeal from the judgment but by proper application to the trial court. Hall v. Merrill, 47 Minn. 260, 49 N. W. 980.

3. It is contended that the allowance of amendments is discretionary with the court. This is, in general, true. Berthold v. Fox, 21 Minn. 51. It is true in cases which call for the exercise of judicial discretion, as where questions of fact arise, or the situation of the parties has changed, or the rights of third parties have intervened. Foster v. Brick, 121 Minn. 173, 175, 141 N. W. 101. But in a case where the mistake is conceded, where it is material, where the judgment is unexecuted, and the parties are still in statu quo and the rights of no third parties have intervened, the parties are entitled as a matter of right to the judgment the court has ordered, and it is the duty of the court to correct the mistake. Nell v. Dayton, 47 Minn. 257, 49 N. W. 981; O'Bryan v. American Inv. & Imp. Co. 59 Wash. 371, 97 Pac. 241; 1 Freeman, Judgments (4th ed.) 74. Mere delay does not bar the right. Nell v. Dayton, supra; Chase v. Whitten, 62 Minn. 498, 65 N. W. 84. If, as defendant says, this prolongs the right of appeal, in answer it may be said she would have avoided such a result had she not taken a judgment that she was palpably not entitled to. Defendant cannot blame plaintiff for the consequences.

4. It is said plaintiff has not yet indicated a willingness to receive

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the payments provided for in the amended findings and order for judgment. Plaintiff is not required to act until entry of the judgment. It may appeal from the judgment if it sees fit. When the judgment is final it has a right to a judgment such as the court orders.

5. A motion was made after decision of another case in this court to vacate the order denying a motion for a new trial and to again amend the findings in this case. The motion was denied. Defendant contends that order is res adjudicata in this proceeding. We see no ground for so holding. The issues are different. On that application plaintiff asked the judge to change his judicial decision. Such an application must be made before the time for appeal has expired. Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057. On this application plaintiff asks the court for a judgment in accordance with the decision of the judge. The fact that there is a time limit in the former case has no bearing on the question whether there should be a time limit in the latter.

Order reversed.

STATE EX REL. A. C. JEFFERSON AND ANOTHER v. DISTRICT COURT OF RAMSEY COUNTY AND OTHERS.[1]

November 16, 1917.

No. 20,714.

Workmen's Compensation Act.

The evidence is sufficient to sustain the finding of the trial court that the death of the deceased employee resulted from the injuries which he had sustained and not solely from disease.

Upon the relation of A. C. Jefferson and another the supreme court granted its writ of certiorari directed to the district court of Ramsey county to review proceedings in that court, Michael, J., under the Work-

[1]Reported in 164 N. W. 1012.

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men's Compensation Act, brought by Mary Ballauf, as widow of Joseph Ballauf, employee, against relator, as employer. Affirmed.

Briggs, Thygeson & Everall, for relator.

W. E. Barnacle, for respondents.

TAYLOR, C.

This is a case under the Workmen's Compensation Law in which the district court of Ramsey county awarded compensation to Mary Ballauf for the death of her husband Joseph Ballauf. The question presented is whether the evidence is sufficient to sustain the finding of the court that the death of Joseph Ballauf was caused by injuries which he sustained while in the employ of the relator Jefferson. That he was crushed under a load of lumber and suffered several broken ribs and other lesser injuries, and that he was confined to his bed from that time until his death six weeks later, is conceded; but the relators contend that his death was caused solely by disease, and did not result in consequence of the injuries which he sustained. An autopsy disclosed that he had pulmonary tuberculosis in such an advanced stage that one lung had been entirely destroyed and the other to a considerable extent; also that he was suffering from other diseases. The relators called three physicians who testified that, in their opinion, his death was caused by pulmonary tuberculosis, and that the injuries which he had sustained pulmonary tuberculosis, and that the injuries which he had sustained called no physicians, but other witnesses testified that the deceased had worked continuously at hard labor until the accident, had apparently been in good health at all times theretofore, and had never been able to leave his bed thereafter. In view of all the circumstances, we are unable to say that it conclusively appears that the injuries sustained had no part in causing his death, nor that the trial court was concluded by the testimony of the experts. The decision of the trial court is affirmed.

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STATE EX REL. D. S. B. JOHNSTON LAND COMPANY v. DISTRICT COURT OF PENNINGTON COUNTY AND OTHERS.[1]

November 16, 1917.

No. 20,750.

Venue — local action — construction of statute.

1. Section 7715, G. S. 1913, providing for the trial of actions concerning rights and interests in real property in the county where the land is located, applies only to such actions as are wholly local, as distinguished from those that are partly local and partly transitory.

Same — specific performance of land contract.

2. The action for the specific performance of a contract for the sale of land is not wholly local in its essential respects, and as to the place of trial is controlled by G. S. 1913, § 7721.

Same.

3. Such an action is local or in rem only incidentally and to the extent the judgment therein may decree title to the land in the event the defendant refuses to convey the same in obedience to the command of the court.

Upon the relation of D. S. B. Johnston Land Company the supreme court granted its alternative writ of mandamus directed to the district court of Pennington county and the judges and clerk thereof, commanding them to transmit the files and records in an action by J. W. McGilvrey against relator company from Pennington county to Ramsey county. Motion for a peremptory writ granted.

Moore, Oppenheimer & Peterson and *F. C. Hodgson,* for relator.

Theo. Quale, for respondents.

BROWN, C. J.

Action in the district court of Pennington county for the specific performance of a contract for the sale and conveyance of certain land situated therein. Defendant is a domestic corporation with its place of

[1]Reported in 164 N. W. 1014.

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business in Ramsey county, and before the expiration of the time to answer duly demanded a change of venue to that county on the ground of its residence therein. The clerk of the Pennington county district court refused to make the change by a transmission of the files in the action to the clerk of the Ramsey county court, and the district court of Pennington county[1] denied defendant's motion for an order requiring him to do so. Thereupon defendant sued out from this court an alternative writ of mandamus commanding a transfer of the action to Ramsey county. A return to the writ was duly made by respondents and the question involved was submitted to the court upon the briefs of counsel.

The only question presented is whether the action for specific performance of a contract to convey land is local, and within section 7715, G. S. 1913, triable only in the county where the land is located. We answer the question in the negative.

The rule of the common law, as indicated by the authorities, is that the action is personal in its nature, therefore transitory and triable in the county where the parties reside. In the absence of statutory provisions to the contrary the rule is applied by practically all the courts. 20 Enc. Pl. & Pr. (2d ed.) 398-400; Dehart v. Dehart, 15 Ind. 167; Rouke v. McLaughlin, 38 Cal. 196; Loaiza v. Superior Court, 85 Cal. 11, 24 Pac. 707, 9 L.R.A. 376, 20 Am. St. 197; Burrall v. Eames, 5 Wis. 260; Lindley v. O'Reilly, 50 N. J. Law, 636, 15 Atl. 379, 1 L.R.A. 79, 7 Am. St. 802; Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L.R.A. 614; Brown v. Desmond, 100 Mass. 267; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Worthington v. Lee, 61 Md. 530; Johnston v. Wadsworth, 24 Ore. 494, 34 Pac. 13; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; Boswell's Lessee v. Otis, 9 How. (U. S.) 326, 13 L. ed. 164; Epperly v. Ferguson, 118 Iowa, 47, 91 N. W. 816; Close v. Wheaton, 65 Kan. 830, 70 Pac. 891. While some diversity of opinion may appear in the adjudged cases, we have found no well considered case holding that the action is wholly and entirely in rem, except as pointed out in Boswell's Lessee v. Otis, supra; though there can be no doubt that it may be partly in rem and partly in personam. Burrall v. Eames, 5 Wis. 260.

In many of the state jurisdictions, including this state, statutes have been enacted requiring the trial of actions involving rights and interests in real property in the county where the land is located, and these

[1][Grindeland, J.]

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enactments have been variously construed by the courts. 36 Cyc. 773. Our statute (section 7715), makes no direct mention of actions for specific performance, though it does provide generally that actions for the determination in any form of an estate or interest in lands shall be tried in the county where the land is situated. We have heretofore construed this statute as applicable only to such actions as are wholly local, as distinguished from those which are partly local and partly transitory. Smith v. Barr, 76 Minn. 513, 79 N. W. 507; State v. District Court of Pine County, 94 Minn. 370, 102 N. W. 869, 3 Ann. Cas. 725. The action clearly is not wholly local, and within the rule stated is not controlled by section 7715, but by section 7721, which gives a defendant the right of trial in the county of his residence. The object of the action is to compel defendant to perform his contract by the execution to plaintiff of a deed of the land. It is personal in its essential particulars, and in rem only incidentally and to the extent the final judgment may decree a transfer of the land in the event defendant refuses to comply with the command of the court to execute a proper deed. But that feature does not make the action local nor render section 7715 applicable. 40 Cyc. 57. That the court has jurisdiction to so decree though the land be within another judicial district, is sustained by our decisions. Gill v. Bradley, 21 Minn. 15; 1 Notes on Minn. Reports, 856. And, following the rule stated in the Smith case, supra, to the effect that section 7715 applies only to actions wholly local, we hold that the action for specific performance of a contract for the sale of land, brought by the vendee against the vendor, is transitory and triable in the county in which the defendant resides, though the land be situated in some other county.

Let a peremptory writ issue.

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LAKE HARRIET STATE BANK OF MINNEAPOLIS v. F. J. VENIE AND OTHERS.[1]

November 23, 1917.

No. 20,477.

Corporation — contract with promoter — findings supported by evidence.

1. The findings to the effect that plaintiff's bank building had been erected and the site therefor purchased by defendant F. J. Venie, pursuant to agreements between himself and the other promoters that he should make such purchase and erect such building and be repaid the actual cost thereof, and that such agreements had been ratified after the incorporation of plaintiff, are sustained by the evidence.

Same — promoter not entitled to more than sum expended.

2. Venie having been repaid all the advancements and expenditures made by him, is not entitled to retain any part of the lot purchased for the bank, nor the proceeds of that part of the lot which by agreement among the promoters was sold, after such purchase, to reduce the amount which the bank would be called upon to pay.

Same.

3. In settling his account for expenditures, Venie could not represent both himself and the bank; and the bank is entitled to recover the excess above the amount expended which, as president of the bank, he had caused to be credited to himself on account of such expenditures, and subsequently withdrew from the funds of the bank.

Same — legal title held for plaintiff.

4. He conveyed the legal title to a part of the lot to defendant, Harriet Loan & Realty Company, but, as that company stands in his shoes, plaintiff is entitled to a conveyance thereof.

Same — plaintiff entitled to recover amount withdrawn.

5. A note having been executed to Venie by the Realty Company without consideration, and he, while president of the bank and without other authority having placed this note, unindorsed, among the assets of the bank and withdrawn the amount thereof from the funds of the bank, the bank had the right to repudiate the transaction and recover from him the amount so withdrawn.

[1]Reported in 165 N. W. 225.

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Corporation — when directors are liable for losses.

6. Directors of a corporation are liable for losses resulting from abuse of their authority, or gross neglect of their duties; and the individual defendants, having violated their duty as directors by authorizing Venie to appropriate to himself funds of the bank to which they knew or ought to have known that he was not entitled, and such funds having become lost to the bank, they are liable therefor.

Action in the district court for Hennepin county against the directors of plaintiff bank for an accounting for their acts as directors, to recover certain moneys received by them, and to have plaintiff declared the owner of certain real estate. The case was tried before Jelley, J., who made findings and ordered judgment in favor of plaintiff for $1,005, and for $1,500 in addition against defendant F. J. Venie. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

Albert L. Hershman, for appellants.

McDowell & Fosseen, for respondent.

TAYLOR, C.

Defendants appeal from a judgment in favor of plaintiff. The findings of fact upon which the judgment is based cover 20 printed pages, and we shall not attempt to give a summary of them, but merely to outline the situation sufficiently to indicate the questions presented. The only exhibits returned to this court are those contained in a supplemental record printed by plaintiff, and consequently we must assume that the findings, so far as they are based upon the exhibits not returned, are sustained thereby. Beginning in January, 1913, defendant F. J. Venie sought to interest various parties in the project of establishing a state bank in the vicinity of Lake Harriet in the city of Minneapolis, and continued his efforts until they resulted in the organization of plaintiff bank on May 13, 1914, with Venie as its president. After he had induced several parties to join with him in the project and to agree to take stock in the proposed bank, an arrangement was made between them by which he purchased, as a site for the bank, a corner lot 128 feet in length by 58 feet in width with a dwelling house thereon, known as the Peck lot, for the sum of $6,500, of which $5,000 was secured

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by a mortgage upon the land bearing interest at the rate of five and one-half per cent per annum, $960 was to be paid by issuing to the vendors stock of that value in the bank when organized, $400 was to be paid on the delivery of the deed, and $140 on execution of the contract for deed. The contract bore date February 27, 1913, and the deed to Venie was received April 3, 1913. In July, 1913, Venie, on behalf of the bank and himself, made a contract by which he sold the rear or east 68 feet of the lot to the Tri-State Telephone Company, and by which the telephone company agreed to pay $3,410 therefor, and also agreed to remove the dwelling house then on the lot to another lot, and to pay a further sum of one-half the net amount realized from the sale of the dwelling house. This contract was carried out, and $1,500 was realized from the sale of the dwelling house, one-half of which, or $750, was paid to Venie in September, 1914, as hereinafter stated. On August 2, 1913, Venie purporting to act "for and on behalf of the Lake Harriet State Bank then organizing," contracted for the erection of a bank building on the west 60 feet of the lot, the building to be completed by December 1, 1913. The building was constructed but was not completed until the following spring, and the sum of $191 was deducted from the contract price as damages for the delay. In December, 1913, Venie conveyed the west 60 feet of the lot, including the bank building, to the Harriet Loan & Realty Company, a corporation which he managed and controlled. On April 24, 1914, Venie caused the Harriet Loan & Realty Company to give a note secured by a mortgage upon the portion of the lot occupied by the bank building to the Minnesota Loan & Trust Company for $5,500, and satisfied the original purchase money mortgage of $5,000 above mentioned out of this loan and credited the remainder thereof to plaintiff bank. On May 9, 1914, the Harriet Loan & Realty Company executed a note and mortgage to Venie for $1,500, the mortgage covering all that part of the west 60 feet of the lot not actually occupied by the bank building. Shortly after the bank was opened for business, Venie, without indorsing it, placed this note in the bank and withdrew the amount of it from the bank funds. He also assigned the mortgage to the bank and placed the assignment on record. Before the bank had opened for business, Venie caused the Harriet Loan & Realty Company to execute a deed, of date May 11, 1914, to

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the bank for that part of the west 60 feet of the lot, and only that part thereof, actually occupied by the bank building, and placed this deed on record without the knowledge or consent of any of the other bank officials. In September, 1914, and while he was president of the bank, Venie rendered an account to the bank in which he charged the bank with the contract price of the Peck lot, with the contract price for the erection of the bank building, and with all other expenditures made by him on account of either the lot or the building, including the interest paid upon the mortgage given for the deferred part of the purchase price of the lot. In addition to the interest actually paid upon this mortgage, Venie charged the bank with the further sum of $255.06 as interest upon the purchase price of the lot, being the difference between the amount of interest actually paid by him and the interest upon $6,500, the entire purchase price of the lot, at the rate of 7 per centum per annum. Venie credited the bank with the $3,410 received from the telephone company and with various other items, but did not credit the bank with the $750 due from the telephone company as one-half the net proceeds from the sale of the dwelling house, nor with the $191, deducted from the contract price for erecting the bank building. This statement of account was the only thing ever presented by him to the bank in support of his claim to the sum of $7,500 which, without authority from the directors, he had credited to himself upon the books of the bank at the time it opened for business, and subsequently withdrew from its funds.

The trial court held that the bank was the owner of the west 60 feet of the Peck lot, and directed a conveyance to the bank of all that part thereof not already conveyed to it. The court further held that the bank was entitled to recover from Venie the $1,500 which he had withdrawn from its funds for the note executed by the Harriet Loan & Realty Company, and directed that upon payment thereof the note, but not the mortgage securing it, be returned to him. The court further held that the bank was entitled to recover from Venie the $750 received by him from the proceeds of the sale of the dwelling house removed from the lot, the $191 allowed as damages for failure to complete the bank building on time, and the $255.06 which he had charged as interest over and above the amount which he had paid as interest.

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In his answer and at the trial, Venie took the position that he had purchased the Peck lot and erected the bank building on his own account and at his own expense; that all of the lot not included in the deed to the bank and all the profits derived from the deal with the telephone company belonged to him personally, and that he had sold the building and the ground upon which it stood to the bank for $13,000, of which $5,500 was represented by the mortgage upon the property and $7,500 by the credit to him upon the books of the bank. His principal contention upon this appeal is that the arrangements and agreements between himself and the other prospective stockholders of the bank in respect to the selection and purchase of the Peck lot, in respect to the part thereof that should be sold, in respect to the deal with the telephone company, and in respect to the erection of the bank building, were not binding upon the bank after it was incorporated and organized, and consequently were not binding upon him; and that the evidence offered to prove these arrangements and agreements should have been excluded and can be given no effect. Conceding that these agreements would not be binding upon the bank unless ratified and confirmed by it after its incorporation, yet the evidence is ample to show that after its organization both the bank and Venie acted upon the theory that these agreements were valid and binding and thereby assented to and ratified them.

The Peck lot was purchased and the bank building erected thereon pursuant to an agreement between Venie and the others who then expected to become stockholders in the bank to the effect that Venie should purchase this lot and erect the building; that he should convey the property to the bank as soon as it was incorporated; and that he should render an account to the bank showing the actual cost of the property, and should be repaid such actual cost. The sale of a part of the lot to the telephone company was arranged and approved by the same parties for the purpose of lessening the amount which the bank would be called upon to pay, and with the understanding that the remainder of the lot would be conveyed to the bank. Venie apparently made the cash payments of $540 to the owners of the lot out of his own money. He made the payments for the building in part out of his own money, in part out of the money paid by the telephone company, and in part out of money

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received by him from prospective stockholders as advance payments upon the stock to be issued to them when the bank was organized.

Pursuant to the previous arrangements made on its behalf by the promoters and without any other or new agreement, the bank issued its stock of the value of $960 to the former owners of the lot as a part of the purchase price of the lot, issued its stock to the several stock subscribers for the amounts which they had advanced upon their subscriptions during the construction of the building, took possession of the building when completed and has ever since occupied it as its place of business, and permitted Venie to take credit for and withdraw from its funds the full amount of all his expenditures without questioning its liability therefor. These facts, mostly undisputed, and, so far as disputed, found by the court upon sufficient evidence, are sufficient to sustain the finding of the court to the effect that the agreements made in behalf of the bank by its promoters had been ratified and confirmed by both the bank and Venie after its incorporation. That the above mentioned stock was charged to Venie's account on the books of the bank is of no special significance, as he had received and used the money paid therefor by the stock subscribers, and was credited with the purchase price of the lot in the full sum of $6,500. None of the agreements made or assented to by the several promoters were ever repudiated in any way by the bank, and no other or different arrangements or agreements were ever made, or attempted to be made, except as hereafter stated.

Instead of conveying the entire west 60 feet of the Peck lot to the bank as contemplated by the agreement to which all parties had assented, Venie caused the Harriet Loan & Realty Company, which in this matter was merely an instrumentality made use of by him for the purpose of handling the property, to execute a deed to the bank of only that part of the lot actually covered by the bank building, and as president of the bank he assumed to accept it on behalf of the bank. In doing so he was not carrying out the prior agreement, but was attempting to satisfy that agreement by conveying only a part of the property in order to retain the remainder for his own benefit. The court found upon sufficient evidence that none of the other bank officials had anything to do with this transaction or even knew of it. In such a trans-

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action, Venie could not represent both the bank and himself, and the bank is not bound by his acts and is entitled to enforce the original agreement. Rhodes v. Webb, 24 Minn. 292; Atwater v. Smith, 73 Minn. 507, 76 N. W. 253; State Bank of Isanti v. Mutual Tel. Co. 123 Minn. 314, 143 N. W. 912, Ann. Cas. 1915A, 1082.

The contract with the telephone company recognized the bank as a party thereto, and when Venie applied for one-half the proceeds from the sale of the dwelling house, the telephone company, for that reason, had declined to pay it to him until authorized to do so by the directors of the bank.

Venie, as president of the bank, called a meeting of the board of directors for September 8, 1914. The directors present at this meeting were: W. J. Smith, L. L. Vrooman, and defendants F. J. Venie, John Devney, J. J. Venie and George H. Venie. George H. Venie is the brother of F. J. Venie, J. J. Venie is his father and John Devney is his father-in-law. Venie had prepared a lengthy resolution which he caused his brother, George H. Venie, to move for adoption at this meeting. The resolution recited that he had expended much time and money in organizing the bank, and had saved the bank large amounts in the purchase of the site, in the erection of the bank building, and in procuring the bank fixtures, as shown by the accounts which he had rendered, and directed that in consideration thereof the bank should convey to him all the interest of the bank in the proceeds of the dwelling house removed from the Peck lot, and in all that part of the west 60 feet of the Peck lot not actually occupied by the bank building. This resolution was so vigorously opposed by Smith and Vrooman that action thereon was deferred and the meeting adjourned until the next day. On the next day, Devney, J. J. Venie and George H. Venie voted for the resolution and Smith and Vrooman against it, and F. J. Venie as the presiding officer declared it carried. At this same meeting Devney moved that the accounts for the bank lot and bank building rendered by F. J. Venie be approved, and Devney, J. J. Venie and George H. Venie having voted for the motion, F. J. Venie declared it carried. By approving these accounts, the directors named, among other items, approved and allowed to Venie the sum of $255.06, which he had credited to himself as interest over

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and above the amount which he had paid as interest. Shortly after this meeting, Venie presented to the telephone company a copy of the resolution adopted at the meeting, and thereupon the telephone company paid him $750 as one-half the proceeds of the dwelling house.

The Harriet Loan & Realty Company seems to have been organized by Venie as a sort of holding company for such property as he and his relatives saw fit to convey to it. He and his relatives held all the stock, except two shares issued without consideration to nominal officers, and he exercised absolute control and management of it, and used it merely as an agency in the furtherance of his projects. In December, 1913, he conveyed the west 60 feet of the Peck lot to this company, but the company gave no consideration for it, and clearly has no greater rights in it than Venie possessed. In May, 1914, he caused the company, by his wife as president and a nominal secretary, to execute to him the note for $1,500 previously mentioned, and to secure it by a mortgage upon that part of the west 60 feet of the Peck lot not occupied by the bank building. There was no consideration for this note other than the prior conveyance of the lot to the company. Without authority from the directors of the bank or from any one authorized by them to pass upon such matters, Venie placed the note, unindorsed, among the notes of the bank, and took the amount of it from the funds of the bank. The bank was not a bona fide purchaser of the note, and it was subject to any defenses which the realty company had against it. The land upon which it was secured belonged in equity to the bank and not to Venie or the realty company, and the note was in fact without consideration so far as the realty company was concerned. The bank unquestionably had the right to repudiate this transaction.

The trial court also held that the bank was entitled to recover from Devney, J. J. Venie and George H. Venie, the $750 paid to Venie by the telephone company upon the resolution adopted by them, and the $255.06 allowed to him as interest over and above the amount which he had paid as interest.

The directors of a corporation occupy a fiduciary relation to it which imposes upon them the duty to use the authority given them solely for the benefit of the corporation and its stockholders, and to exercise ordinary business care and diligence to see that its property is not

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wasted nor taken from it upon unfounded claims. The law does not permit them to appropriate such property to themselves nor give it to others; and if they waste it, or apply it in payment of claims which they have no authority to pay, or by negligent inattention to their duties suffer others to appropriate it without right, they are liable to the corporation for any losses resulting from such misuse of authority or neglect of duty. Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Horn Silver Mining Co. v. Ryan, 42 Minn. 196, 44 N. W. 56; National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818, Ann. Cas. 1914D, 830; Mower v. Staples, 32 Minn. 284, 20 N. W. 225; 7 R. C. L. 473, § 454.

The court found and it is practically admitted, that, "J. J. Venie, George H. Venie and John Devney, and neither of them, paid any attention whatever to the affairs and business of said bank and only acted at the instance of and as directed by said F. J. Venie." The court made other findings to the effect that they had violated their trust by relinquishing to Venie the $750 in the hands of the telephone company which belonged to the bank, and by approving and allowing his account after they were chargeable with notice that it contained the unwarranted charge of $255.06 for interest, in addition to the interest actually paid; and that Venie was then solvent but had since become insolvent, and was still insolvent at the time of the trial.

We are satisfied that the trial court reached the correct conclusions; that its findings of fact, so far as material, are sustained by the evidence; and that these findings justify its conclusions of law.

The judgment is affirmed.

ELIZABETH DORGAN v. CITY OF ST. PAUL.[1]

November 23, 1917.

No. 20,481.

Municipal corporation — trench in snow — negligence.

The digging of a trench from 6 to 10 feet long and 3 feet wide at the

[1]Reported in 165 N. W. 131.

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top in snow and ice along the curb in a public street, in the spring of the year during the breaking up season, and leaving the same unguarded, does not, under the showing in this case, constitute actionable negligence.

Action in the district court for Ramsey county to recover $2,500 for injuries received while walking across a street in defendant city and $100 for medical expenses. The answer alleged negligence on the part of plaintiff. The case was tried before Dickson, J., who when plaintiff rested denied defendant's motion to dismiss and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for $250. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

O. H. O'Neill and *John A. Burns,* for appellant.

Stan J. Donnelly and *Stan Dillon Donnelly,* for respondent.

QUINN, J.

Action to recover for personal injuries sustained by slipping and falling into a hole in the ice and snow upon a public street in the city of St. Paul. Plaintiff recovered a verdict. From an order denying its motion for judgment or for a new trial defendant appealed.

Carroll avenue and Louis street intersect at right angles, each having curbs and sidewalks on either side, but no cross-walks. There is a catch basin at the curb on the south side of Carroll avenue, at a point some 2 feet west of the sidewalk line on the west side of Louis street. The bottom of the opening into this catch basin is 11 inches below the top of the curb. Carroll avenue slopes for a considerable distance from the west and Louis street from the south toward the intersection, so that a freshet from rains or melted snow has free access to the catch basin unless impeded by some obstacle.

The snowfall had been heavy during the winter, and on March 1 the average accumulation of snow in the vicinity was over 11 inches, which melted away so that on March 18, the day of the accident, there was but about one inch left. During this time the temperature was varied, ranging from 7 degrees below to about 40 above zero, so much water and ice accumulated about the intersection referred to. Complaint

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was made to the city street department, and, a few days prior to the accident, that department sent a crew out who cut a trench in the snow and ice along the curb from near the west sidewalk line some 8 or 10 feet west past the catch basin, so as to allow the water to enter the basin, but failed to open up the intake to the sewer so that water might enter the same. This trench was about 3 feet wide, the full depth of the snow and ice, and had filled with water. On the morning of the eighteenth the water was frozen over, so that in appearance it was much like the other portions of the surface of the street. Plaintiff was passing south on the walk on the west side of Louis street on her way home. In crossing Carroll avenue, making her way through the slushy snow, she met a little girl, and, stepping aside slightly to the west so as to avoid the child, her foot slipped and she was precipitated into the trench, thereby sustaining the injury complained of. The place was not guarded, nor had any signals been placed there to expose the situation.

The negligence charged against the defendant consisted of the act of its agents and servants in cutting the trench along the curb in such a way as to allow slushy snow to accumulate therein and conceal the excavation from view, and in failing and neglecting to guard or place signals so as to expose the situation, and it was upon this theory that the case was tried and submitted to the jury.

In presenting the case to this court, counsel for defendant contended that defendant was entitled to judgment. A new trial was not urged. The decisive question then is: Was there a showing made upon the trial that defendant, under the circumstances, was guilty of negligence in leaving the trench unguarded or without signals of some kind to warn the traveling public of the situation? The winter had been severe, the fall of snow heavy, and the breaking up season had arrived. The days were warm but the nights cold, and the accumulated snow and ice was fast melting away. The trench was from 6 to 10 feet long, about 3 feet wide at the top and constructed along the curb in the melting snow and ice. The water from melting snow accumulated in the trench. The east end of the trench was a few inches west of the line of travel across the street. The slushy snow had frozen over during the night, giving the place an appearance similar to the surrounding portions of the street.

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Can it be said, speaking from experience, that the result in the instant case might reasonably have been foreseen or anticipated from the cutting of such a trench at that place and under those circumstances, and leaving it unguarded? We do not think so. It is a reasonable and common practice, during the breaking up of winter in a climate like ours, to cut such trenches in the streets for the purpose of getting rid of the water which accumulates from the melting snow. Nor is it deemed necessary, speaking generally, to guard them with danger signals. Such a requirement would place an impracticable and in many instances an almost unbearable burden upon the municipalities having the care of the public streets and ways. At this season of the year streets often, unavoidably, become almost impassable for a limited time on account of the melting snow.

We are of the opinion that it cannot be reasonably said that constructing the trench in question and leaving it unguarded was such negligence as to render the city liable. It follows that the defendant was entitled to a directed verdict.

Reversed with directions to the court below to award judgment in defendant's favor.

BRETA ANDERSON v. CITY OF MINNEAPOLIS.[1]

November 23, 1917.

No. 20,559.

Municipal corporation — notice of claim for injury — "patch of ice."

A notice of claim under section 1786, G. S. 1913, for loss or injury sustained on account of a defect in a public street, sidewalk, or public grounds of a city, sufficiently states the circumstances, if the defect causing the injury is pointed out so that a full investigation may be had. It need not be as specific as the complaint in an action to enforce the claim, but must assign the same defect as the cause of the injury. Under this rule, a "patch of ice," given in the notice as the cause of plaintiff's injury, is a sufficient designation of the circumstances to admit proof of "an uneven ridge of ice," the defect alleged in the complaint.

[1]Reported in 165 N. W. 134.

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Action in the district court for Hennepin county to recover $5,000 for injuries received from slipping upon an icy sidewalk. The answer alleged negligence on the part of plaintiff. The case was tried before Fish, J., who at the close of the testimony granted defendant's motion to dismiss the action. From an order denying her motion for a new trial, plaintiff appealed. Reversed.

Arctander & Nordbye, for appellant.

C. D. Gould, City Attorney, and *W. G. Compton,* Assistant City Attorney, for respondent.

HOLT, J.

The court dismissed the action on the ground that the notice of claim against the defendant was insufficient, and plaintiff appeals from the order denying a new trial.

The complaint alleges that the city negligently allowed ice to accumulate on the public sidewalk in front of the fire house at Fourth street and Fifteenth avenue south in the city of Minneapolis, which said accumulation of ice was to the knowledge of defendant uneven, round, slippery and ridgelike, and that by reason thereof plaintiff slipped, in passing over said sidewalk, fracturing her leg. Under such cases as Wright v. City of St. Cloud, 54 Minn. 94, 55 N. W. 819, and Smith v. City of Cloquet, 120 Minn. 50, 139 N. W. 141, the complaint would seem to state a cause of action, and the learned trial court so held.

Section 1786, G. S. 1913, provides, in substance, that no action for damages shall be maintained against any city on account of loss or injury sustained by reason of any defect in its streets, sidewalks, or other public works or grounds unless a notice in writing "stating the time, place and circumstances thereof," is served on the city council within 30 days after the loss or injury. A notice in this instance was served in time, but the trial court was of the opinion that "the circumstances" of the injury were not adequately stated and therefore the action must fail. This is the only question in the appeal; for, upon this record, it cannot be said that the obstruction was created by a city department in the performance of its function as a governmental agency, so as to absolve the city from liability, in view of the allegations of the complaint

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that the obstruction and the dangerous condition thereby created were known to the city.

The object of the notice is to inform the city of the claim, while the facts upon which it is based are fresh, so that upon investigation it may be intelligently adjusted without litigation, if just, and also to enable the city to obtain proper evidence to efficiently defend in court, if the demand be exorbitant or without merit. The notice need not state the circumstances or facts with that fullness and accuracy required in a pleading. In a personal injury claim it is sufficient if it specifies the cause of the injury, so that the officers or agents of the city can ascertain the facts in connection therewith without being misled. Larkin v. City of Minneapolis, 112 Minn. 311, 127 N. W. 1129; Ackeret v. City of Minneapolis, 129 Minn. 190, 151 N. W. 976, L.R.A. 1915D, 1111, Ann. Cas. 1916E, 897, and cases therein cited; and Weber v. City of Minneapolis, 132 Minn. 170, 156 N. W. 287. The main purpose of the statute is not to require such a statement of the circumstances as to show an absolute liability, but rather such information that the authorities may be able to make a full investigation of the cause of the injury and determine the city's liability therefor. If the notice points to one defect as the cause of the injury, it will not serve as a condition precedent to an action based on an entirely different defect. This is illustrated by the case of Olcutt v. City of St. Paul, 91 Minn. 207, 97 N. W. 879, where the notice stated the accident to have been caused by the unsafe condition of the sidewalk, because of the city's permitting it to become covered with snow and ice and allowing persons to coast thereon so as to make it slippery, but the complaint and proof showed that the injury was produced by the plaintiff's foot going through a hole in the sidewalk when run into by a coaster. In the instant case the notice specifies "the circumstances" as slipping on a "patch" of ice which the city negligently had suffered to exist for a long time on the sidewalk in front of its fire house on Fourth street near Fourteenth avenue south. This is essentially the cause of action set out in the omplaint. A "patch" of ice may be in the shape of an uneven ridge constituting an obstruction and menace to safe travel. No point is made upon the misprint or the misdescription in the notice of the place of the accident, it being placed near Fourteenth instead of Fifteenth avenue south.

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In Smith v. City of Cloquet, supra, a notice was held sufficient although it contained no reference to ridges of ice, the defect named in the complaint and the one upon which the verdict was predicated. There the notice set out the circumstances as follows: "The sidewalk where I fell was covered with snow which had been allowed to become packed and the snow and ice at said point rendered the sidewalk unsafe for pedestrians to pass over, and by reason of the slippery and unsafe condition of the sidewalk at said point, I slipped and fell, sustaining the injuries above detailed; that the sidewalk at said point was rendered unusually dangerous and slippery by reason of the fact that children were allowed and permitted by the city authorities to use the same sliding down hill for amusement; that said sidewalk was not sanded in order to make the same safe for pedestrians to pass over and by reason of these facts, I sustained the injury described."

It may be held that, if the notice in stating the circumstances of the injury set forth facts showing that no liability could in any event arise therefrom, the city authorities would not be required to investigate, and might treat the notice as wholly nugatory. But such is not this notice. It appears therefrom that the "patch" of ice was a menace to safe travel, and this may have been because of its shape, location and surroundings. It called for an investigation which if pursued would have given the city all details necessary either to settle the claim or defend against it.

Tested by the rules announced in the prior decisions of this court, above referred to, the notice was sufficient as a condition precedent to maintaining the action alleged in the complaint.

Order reversed.

CLARA M. THEISEN v. W. A. DURST AND ANOTHER.[1]

November 23, 1917.

No. 20,560.

Contributory negligence — question for jury.

In this, a personal injury action, the evidence made the issue as to

[1]Reported in 165 N. W. 128.

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contributory negligence a question for the jury, and the amount of the verdict is not so clearly unwarranted as to justify this court in interfering with it.

Action in the district court for Hennepin county to recover $50,000 for injuries received in a collision with an automobile driven by defendant Sebenthal, a servant of defendant Durst. The answer alleged that the accident and resulting injuries were due solely to the negligence of plaintiff. The case was tried before Hale, J., and a jury which returned a verdict for $12,750. From an order denying their motion for a new trial, defendants appealed. Affirmed.

Cobb, Wheelwright & Dille and *C. M. Bracelen,* for appellants.

Larrabee & Olson and *Brady, Robertson & Bonner,* for respondent.

TAYLOR, C.

Plaintiff recovered a verdict for injuries sustained by being struck by the automobile of defendant Durst, driven by his chauffeur, defendant Sebenthal, and defendants appeal from an order denying a new trial.

Only two questions are presented: Whether plaintiff was guilty of contributory negligence as a matter of law; and whether the verdict is excessive.

While a large auto truck some 7 or 8 feet high was standing at the curb in front of a store on the north side of Lake street in the city of Minneapolis and about 50 feet east of the intersection of that street with Lyndale avenue, plaintiff came out of the store and proceeded west along the sidewalk 12 or 15 feet beyond the truck and then started diagonally across Lake street toward the southeast corner of the intersection of the two streets. As she stepped from the sidewalk to the street, she looked toward the east and saw nothing upon the street in that direction except the truck; she then looked toward the west, and, when she had passed into the street about 5 feet outside the truck, again looked toward the east and saw the automobile at a short distance coming directly toward her at a high rate of speed. It swerved toward the curb as if to pass behind her, and she hurried forward; it then swerved toward the center of the street, and she was struck by the headlight or fender on the left side of the machine. When she looked eastward the first time,

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the automobile was apparently hidden from view by the truck. Under these circumstances, we cannot say that she was guilty of contributory negligence as a matter of law, and the action of the court in submitting the question to the jury was correct. Arthur v. Skahen, 137 Minn. 432, 163 N. W. 784; Stallman v. Shea, 99 Minn. 422, 109 N. W. 824; Weil v. Kreutzer, 134 Ky. 563, 121 S. W. 471, 24 L.R.A.(N.S.) 557.

Plaintiff had been a successful teacher in public, private and normal schools for some years, had taught oratory and dramatic art, had fitted herself to give public readings, and was about to engage in giving such readings as a profession. The evidence would justify the jury in finding that she had sustained a fracture at the base of the skull and a permanent injury to the brain. She also sustained other severe injuries but has nearly or entirely recovered from those. Experts of high standing testified that, although she might still be able to follow her chosen profession, yet, in their opinion, the injury to her brain would permanently impair her ability to do so. The verdict, $12,750, is large, and we should have been better satisfied had it been less; but it is the province of the jury to determine the amount of the damages in such cases, and the province of the trial court to keep the jury within reasonable bounds. The verdict having been approved by the trial court, we have reached the conclusion that the amount is not so clearly unwarranted as to justify this court in interfering with it.

Order affirmed.

C. H. FINSETH v. J. C. SCHERER, JR.[1]

November 23, 1917.

No. 20,563.

Bills and notes — recovery.

1. Negotiable paper, executed as part of a transaction with a foreign corporation doing business in this state in violation of the laws relating to foreign corporations, may be enforced by a bona fide purchaser thereof.

[1]Reported in 165 N. W. 124.

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Amendment of complaint — admission of evidence — exclusion of exhibits.

2. It was not error for the trial court to allow an amendment of the complaint at the trial; nor to permit the cashier of a bank having personal knowledge of the fact to testify that a depositor had checked out the entire amount to his credit; nor to exclude exhibits offered solely for the purpose of contradicting a witness upon an immaterial point.

Action in the municipal court of Minneapolis to recover $130 on a promissory note. The defense is stated in the third paragraph of the opinion. The case was tried before Charles L. Smith, J., who at the close of the testimony granted plaintiff's motion for a directed verdict. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Brady, Robertson & Bonner, for appellant.

Lancaster, Simpson & Purdy and *James E. Dorsey,* for respondent.

TAYLOR, C.

The municipal court of the city of Minneapolis directed a verdict for plaintiff in a suit upon a promissory note, and defendant appealed from an order denying a new trial.

Section 6206, G. S. 1913, provides that: "Every foreign corporation for pecuniary profit, before it shall be authorized or permitted to transact any business in this state * * * or to acquire, hold, or dispose of property within this state, or to sue or maintain any action at law or otherwise in any of the courts in this state," shall comply with certain prescribed conditions; and section 6208, G. S. 1913, further provides that: "Every such foreign corporation * * * which shall neglect or fail to comply with the foregoing conditions shall be subject to a fine of one thousand dollars to be recovered before any court of competent jurisdiction; * * * and no corporation which shall fail to comply with the foregoing provisions shall maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort." The statute excepts from its operation certain classes of corporations not here important.

The Co-operative Wheat Ranch Company is a West Virginia corporation which was doing business in this state without having complied with the conditions prescribed by the statute, and which employed the

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A. C. Bohrnstedt Company, a Minnesota corporation, to make sales of its capital stock. The Bohrnstedt Company sold some of the capital stock of the Wheat Ranch Company to defendant, and received the note in controversy for a part of the purchase price of the stock. The note contained nothing upon its face to show that it was connected in any way with any transaction of the Wheat Ranch Company. It was made payable to the Bohrnstedt Company, was sold and indorsed by that company to the State Bank of Lafayette before maturity, and was transferred by the bank to plaintiff, its cashier, after maturity. Although plaintiff took the note after maturity, he stands in the shoes of the bank who took it in the usual course of business for value before maturity, and the principal question presented is whether a bona fide purchaser is entitled to enforce it against the maker. Defendant admits the execution and delivery of the note, but contends that it was given in violation of the above statute, and is void for that reason in the hands of whomsoever it may come.

The note was fair on its face and was executed and put in circulation by defendant. In respect to negotiable paper this court has said: "A party who puts his paper in circulation invites the public to receive it of any one having it in his possession with apparent title, and he is estopped to urge an actual defect in the paper, when, through his own act, it ostensibly has none." First Nat. Bank of Freeport v. Compo-Board Mnfg. Co. 61 Minn. 274, 63 N. W. 731. See also Drew v. Wheelihan, 75 Minn. 68, 77 N. W. 558; Askegaard v. Dalen, 93 Minn. 354, 101 N. W. 503; First Nat. Bank of Morrison v. Busch, 102 Minn. 365, 113 N. W. 898.

It is well settled that a bona fide holder of negotiable paper executed as part of a transaction prohibited by statute is within the protection of the above rule, and may enforce such paper, except in those cases in which the statute has expressly or by necessary implication declared it void. The statute in question does not expressly declare such paper void, and according to the great weight of authority cannot be construed as declaring it void by implication. McMann v. Walker, 31 Colo. 261, 72 Pac. 1055; Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 99 N. W. 399, 112 Am. St. 370, 4 Ann. Cas. 347; Commercial Nat. Bank v. Jordan, 71 Fla. 566, 71 South. 760; Citizens Nat.

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Bank v. Bucheit, 14 Ala. App. 511, 71 South. 82; Northern Nat. Bank v. Arnold, 187 Pa. St. 356, 40 Atl. 794; Lauter v. Jarvis-Conklin Mortg. Trust Co. 85 Fed. 894, 29 C. C. A. 473; Hamilton v. Fowler, 99 Fed. 18, 40 C. C. A. 47; Williams v. Cheney, 3 Gray (69 Mass.) 215; Arnd v. Sjoblom, 131 Wis. 642, 111 N. W. 666, 10 L.R.A.(N.S.) 842, 11 Ann. Cas. 1179; Rhodes v. Beall, 73 Ga. 641; Citizens State Bank v. Nore, 67 Neb. 69, 93 N. W. 160, 60 L.R.A. 727, 2 Ann. Cas. 604; State Bank v. Holland, 103 Tex. 266, 126 S. W. 564; Hart v. Livermore F. M. Co. 72 Miss. 809, 17 South. 769; Tescher v. Merea, 118 Ind. 586, 21 N. E. 316; Cowing v. Altman, 71 N. Y. 435, 27 Am. Rep. 70; Glenn v. Farmers' Bank, 70 N. C. 191. To enable the maker to escape liability upon his note when held by a bona fide purchaser, the statute must expressly or by necessary implication declare the note to be void as well as the contract which constitutes the consideration for it. That it was based upon an illegal or prohibited contract is a valid defense against those chargeable with notice thereof, but not against innocent parties who have taken it in reliance upon the law merchant.

2. The original complaint, after alleging the execution of the note to the Bohrnstedt Company, alleged that it was indorsed by that company to plaintiff. At the opening of the trial, the court allowed plaintiff to amend his complaint by alleging that the note was indorsed by the Bohrnstedt Company to the bank and was transferred by the bank to plaintiff. Defendant insists that it was error to allow this amendment at the trial as plaintiff, who took the note after maturity, was not a good-faith purchaser himself, but, under the amendment, was permitted to prove that the bank was a good purchaser. The allowance of amendments at the trial is discretionary with the trial court, and we are satisfied that this discretion was not abused. 2 Dunnell, Minn. Dig. §§7696, 7697, 7698

3. The Bohrnstedt Company had a checking account in the State Bank of Lafayette and the amount of the note was credited to the company in this account. Defendant insists that it was error to permit plaintiff, who was cashier of the bank, to testify that the company had checked out the entire amount to its credit before the maturity of the note. Plaintiff having personal knowledge of the fact that the money had been paid out, was competent to testify to it. We know of no rule of law

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which makes the books of the bank the exclusive evidence of such facts. 2 Wigmore, Ev. § 1560.

4. Two exhibits offered by defendant were excluded, and he insists that this ruling was error on the ground that they tended to contradict the testimony given by plaintiff and therefore had a bearing upon his credibility as a witness. The facts stated in the exhibits were not sufficient to show that the alleged contradiction existed; and, if it did, it was only as to a point which is wholly immaterial. The ruling was therefore correct.

The order appealed from is affirmed.

TOWN OF MOUNT PLEASANT v. TOWN OF FLORENCE.[1]

November 23, 1917.

No. 20,565.

Contract between towns — highway — repair of bridge.

The town of Mount Pleasant in Wabasha county and the town of Florence in Goodhue county adjoin each other. In 1892 the supervisors of the two towns entered into a contract dividing into districts a highway between them, providing that each town should keep in repair the districts allotted to it, and that the expense of keeping in repair certain bridges on the highway should be borne by the two towns in equal shares. In 1914 one of these bridges became out of repair; plaintiff town applied to defendant town for co-operation in making the repairs, but defendant refused to take any part; whereupon plaintiff made the necessary repairs, and brought this action to recover of defendant one-half the cost thereof. It is *held*:

(1) The road between the two towns was a public highway by user.

(2) The findings of fact are sustained by the evidence.

(3) There was no prejudicial error in the rulings on evidence.

(4) The contract was within the powers granted by statute 1894, §§ 1824-1827 to towns having a public highway on the line between them,

[1]Reported in 165 N. W. 126.

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and was valid. This is so notwithstanding that the bridge was on a part of the highway wholly within plaintiff town, that the town line was also the county line, and that the contract was silent as to its duration and did not specify by whom the necessity for or extent of the repairs should be determined.

Action in the district court for Goodhue county to recover $184.47 one-half the cost of repairing a certain bridge. The facts are stated in the opinion. The case was tried before Converse, J., who made findings and as conclusions of law ordered judgment in favor of plaintiff for the amount demanded. From an order denying its motion for amended findings or for a new trial, defendant appealed. Affirmed.

Mohn & Mohn, for appellant.

J. E. Phillips, for respondent.

BUNN, J.

This action was brought by the town of Mount Pleasant in Wabasha county to recover of the town of Florence in Goodhue county one-half of the cost of repairing a bridge on a road between the two towns. The decision was for the plaintiff, motions of defendant for amended findings and conclusions and for a new trial were denied, and defendant appealed.

The facts are best understood by giving the substance of the trial court's findings. While defendant challenges some of these findings as not sustained by the evidence, our examination of the record satisfies us that they are, and we so hold. The facts as so found are as follows:

Plaintiff is a duly organized town of Wabasha county, defendant a duly organized town of Goodhue county. The two towns are adjacent, the entire southern boundary of the town of Florence being identical with the northern boundary of the town of Mount Pleasant. In 1859 the supervisors of the two towns took proceedings to lay out and establish a public highway substantially along the county line between the two towns. The road was established under these proceedings, and has practically ever since been used and worked as a public highway. At a certain point on the highway where it diverges some 20 rods from the county line and into plaintiff town, a bridge, known as the "Wear"

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bridge was constructed as a portion of the highway. There was another bridge, known as the Sandberg bridge, also on a portion of the highway within the limits of plaintiff town. The road runs within plaintiff town for a distance of about two miles only; this was because of the irregularity of the ground on the dividing line. The road and the "Wear" bridge have been traveled, worked and used as a main public highway, and as a town line between plaintiff and defendant towns, throughout its entire length ever since and for many years prior to 1892. In that year plaintiff and defendant, by their respective boards of supervisors, entered into a written contract with reference to their respective duties as to keeping the road and bridge in repair. By this contract each town agreed to keep in repair certain stated sections of the road. It was provided "that the expense of keeping in repair the two bridges near John Wear's residence and also the bridge near the old Sandberg house, shall be borne and paid for by the said towns jointly, each to pay for one-half of same."

For many years following the execution of this agreement said bridge and roadway were maintained in conformity with said agreement, and the said Wear bridge was habitually repaired by plaintiff town, and in each case and until 1914 one-half of the expense thereof was subsequently paid by the defendant to the plaintiff, the said towns thereby maintaining the said bridge jointly and in conformity with said agreement. In 1914, the Wear bridge, one of the bridges described in the contract as "near John Wear's residence" became unsafe for use by the public. Plaintiff town applied to defendant for co-operation in repairing the bridge, but defendant refused to take any part in the repairing; whereupon plaintiff was forced to and did expend the sum of $368.94 in necessary repairs to make the bridge safe for travel. A statement of plaintiff's claim against defendant for one-half of this amount was filed in the office of the clerk of defendant town, but the claim was not paid.

As we have said, the above findings are sustained by the evidence, and they are taken as the basis of determining the legal questions involved. To reach the merits of the controversy unhampered by certain claims of error in the admission of evidence, we say here that we find no prejudicial error in any ruling made.

The question in the case is as to the validity of the contract between

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the two towns. We will dispose first of the contention that the road which was the subject of the contract was not a legal highway because the proceedings in 1859 were invalid. Granting that these proceedings were fatally defective, and we do not see now why they were, there was a legal highway by user, as good a basis for the contract to maintain in repair as if the road had been legally established in the beginning.

Counsel for defendant argue that the contract was ultra vires and void for several reasons. They rightly say that a town has no powers except those given expressly by statute and those necessary to the exercise of the powers expressly given. But we do not agree with their statement that there is no statute which gives a town power to enter into such an arrangement as the one in question. Statutes 1894, §§ 1824-1827, relate to the establishment and keeping in repair of highways lying between two towns. Section 1824 provides for the location of a new road or the alteration or discontinuance of an old one, on the line between two towns, or as nearly on the line as the ground will permit. Section 1825 provides that the supervisors of the two towns, when there may be such highways, shall divide the highway into two or more road districts in such manner that the labor and expense of opening, working and keeping in repair such highway through each of the districts may be as nearly equal as may be, and shall allot an equal number of districts to each town. Section 1826 provides that each district shall be considered as belonging wholly to the town to which it is allotted, for the purpose of opening the road and keeping it in repair. Section 1827 provides that all roads "heretofore laid out on the line between any two towns shall be divided, allotted, recorded and kept in repair in the manner above directed."

Manifestly these provisions apply to highways already existing, as well as to those established under the provisions. We think they apply to roads lying between two towns though in different counties. It is fairly clear that in making the contract involved in this case the supervisors of the two towns were attempting to comply with this law. There was a situation, however, that was not covered by the law; there were bridges on the highway that would need repair. They were parts of the highway, but making the burdens equal between the towns could not be accomplished by leaving the maintenance of the bridges to the town

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in whose district they happened to be. Equality would result by such an agreement as was made, each town sharing equally the cost of maintaining the bridges. We see no particular difficulty in holding that the power to agree to so divide the cost of repairing the bridges was necessary to the exercise of the powers conferred by the above statute. The cases of Town of Waupun v. Town of Chester, 61 Wis. 401, 21 N. W. 251, and Bigelow v. Brooks, 119 Mich. 208, 77 N. W. 810, were decided under statutes very similar to those of this state above referred to, and are ample authority for upholding the power of the towns in this case to make the agreement apportioning the cost of repairing the bridge. The Wisconsin case in particular is almost on all fours with the present one. The towns in that case were in adjoining counties, and the town line was also the county line, as here. The portion of the highway on which was the bridge lay wholly within one of the towns as here. It was held that the agreement to share the expense was valid, and that the plaintiff town, having made the repairs, could recover of the other town its share of the cost.

It is urged that the agreement was void because it perpetually obligates the towns to keep the bridge in repair, thus tying the hands of future town officers, depriving them of their discretionary powers relative to improving highways. Counsel seek to bring this contract within the doctrine of State v. Minnesota Transfer Ry. Co. 80 Minn. 108, 83 N. W. 32, 50 L.R.A. 656. We see no force in the contention and do not sustain it.

It is also argued that, the contract being silent as to its duration, either party could terminate it at its pleasure. The rule invoked does not apply. The agreement had been in force for more than 20 years. It was in its very nature a continuing agreement, and there is no warrant for holding that either party could terminate it at will.

It is said that the contract is void because incomplete and indefinite, in that it does not specify how or by whom the necessity of making repairs or their character and extent is to be determined. These things would naturally be decided by the supervisors of the two towns. There is no claim that the bridge did not need repairs, or of the extent or cost of those made. The point is not well taken.

We have said that the statutory provisions referred to apply, though

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this highway was on the line between two counties. Reference is made to G. S. 1878, c. 13, § 76, as amended by Laws 1883, p. 23, c. 21, § 2, relating to roads in two counties in two judicial districts, and providing how they shall be established by petition to the district court of one of the districts. We fail to see that this statute indicates that the provisions as to roads between two towns do not apply when the towns are in different counties.

The other points raised do not require special mention. We have considered them, and find nothing that requires a reversal of the order appealed from. It seems to us that the court below disposed of the case correctly.

Order affirmed.

E. M. FLICK v. ELLIS-HALL COMPANY.[1]

November 23, 1917.

No. 20,566.

Trial — charge to jury — discretion of trial judge — new trial.

1. A certain latitude as to the form and expression of a charge is necessarily left to the trial judge. It is not improper for him to state the reasons which called legal rules into being. He may direct the attention of the jury to the relevancy of certain evidence to particular issues, so long as the determination of such issues is left to them. Mere verbal inaccuracies in the charge will not be ground for a new trial, unless attention was called thereto before the jury retired.

Contract — consideration.

2. Under the facts developed at the trial the defense of want of consideration, for the contract involved in the action, was not made out.

Cross-examination.

3. The extent to which, upon cross-examination, inquiry may be made, concerning a witness' pecuniary interest in the claim in litigation, is left to the sound discretion of the trial court.

[1]Reported in 165 N. W. 135.

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Admission of evidence — harmless error.

4. The admission in evidence of a telegram was not a violation of the rule forbidding offers of compromise to be received, for according to the claim of plaintiff there was then no dispute as to the validity of the claim, and, furthermore, the party objecting subsequently offered the same telegram, and a response thereto, in evidence.

Contract — defense of fraud.

5. The general allegation of fraudulent representations inducing the contract was not sufficient to admit the defense, since the false or fraudulent representations were not set out, nor was there an offer of proof so as to enable the court to determine whether any such representations constituted a defense.

Action in the district court for Hennepin county to recover $1,548, commission for services rendered pursuant to contract. The case was tried before Fish, J., who at the close of the testimony granted the motion of defendant Ellis to dismiss the action as to him and denied the motion of plaintiff for a directed verdict, and a jury which returned a verdict for the amount demanded. From an order denying its motion for a new trial, defendant appealed. Affirmed.

George T. Simpson and *Hall, Alexander & Purdy,* for appellants.

Hall & Tautges, Bessesen & Bessesen and *Gale P. Hilyer,* for respondent.

HOLT, J.

In this action, upon a written contract, a verdict was rendered for plaintiff. Defendant's motion for a new trial was denied and it appeals.

Plaintiff is doing business as a sales agent. Her husband is the manager. Defendant, a corporation, on December 24, 1915, owned a stock of goods and fixtures at Brookings, South Dakota, when plaintiff, by written contract, undertook to conduct a "quitting business" sale of the same for defendant, the compensation to be 6 per cent of the gross amount of the sales. Pursuant to the terms of the contract, sales were advertised and had up to the twenty-sixth day of February, 1916. Plaintiff claims that then a second contract was entered into terminating the first, but continuing the employment. Under the terms of the second instrument, signed by defendant's president and delivered to plaintiff,

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the latter was to receive as compensation 4 per cent instead of 6, if an exchange or sale of the goods and fixtures was made, and this even though the deal was made by defendant without plaintiff's aid. As a part of that second contract, plaintiff executed and delivered to defendant's president a written document terminating the first agreement. An exchange was made about March 4, 1916, the value of the property thereby disposed of being $43,700. If the second writings ever took effect as a contract, no other result could be arrived at than a recovery in the amount of the verdict rendered, unless the defense of fraud was available under the pleading. The answer alleged, that the second document was executed and delivered by the president of defendant upon the express understanding that it was not to take effect, as a contract, until the two other stockholders of defendant gave their assent; that these stockholders refused their assent; that the signature of defendant to the contract was obtained by means of fraudulent representations; and that there was no consideration. The court submitted the issue of conditional delivery only, holding that fraud was not sufficiently pleaded, and that, if the second contract took effect, there was a legal consideration.

The assignments of error are numerous, but we do not feel called upon to notice the ones not discussed by appellant. The one most urgently pressed upon our attention relates to the court's charge. A certain latitude as to form and expression of a charge is necessarily left to the trial court. The purpose of a trial is to do justice between the litigants. The court as well as the jury has a part to perform in attaining it. It is not amiss, at times, to explain the reasons that called legal rules into being. It may give the jury a clearer view of the issues to be determined by them. Neither is the court prohibited from directing the jury to consider certain evidence in passing upon a particular issue, so long as the jury are permitted to determine the issue according to their own judgment. State v. Rose, 47 Minn. 47, 49 N. W. 404. A mere verbal inaccuracy in the charge does not call for a new trial, where no effort was made to direct the court's attention to it at the time, and it is apparent that had attention been called thereto a correction would likely have followed. Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754, and cases cited under section 9798, Dunnell, Minn. Dig. and 1916 Supp. We therefore see no impropriety in calling attention to the rule that the terms

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of a written contract are not to be contradicted by oral testimony of what the parties said during the negotiations leading up to its execution, and stating the reasons for the existence of the rule. The defense submitted to the jury came in under an exception to the rule, and was thus referred to by the court. But we fail to find any suggestion in the charge that therefore the defense should be disfavorably viewed by the jury. The expressions "escape liability" and "repudiate this agreement," used in the charge, may not have been the most happy wording of the meaning sought to be conveyed; but they clearly come under the rule alluded to, of being inaccuracies of language not available upon appeal, unless the court's attention was directed thereto before the jury retired. The court did not give his opinion as to the effect of the payment of the $432, but the jury were told to consider what bearing it had upon the defense asserted. Nowhere was there an intimation as to what inferences the jury were to draw from the evidence. We find nothing in the charge violating the procedure announced in such cases, cited by defendant, as: State v. Yates, 99 Minn. 461, 109 N. W. 1070; Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763; Valley Lumber Co. v. Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. 216; Coman v. Wunderlich, 122 Wis. 138, 122 N. W. 612.

The question of want of consideration, we apprehend, could not be a material issue; for, if the second contract was conditional, plaintiff had no cause of action; if not conditional, the instrument given defendant, as well as the one given plaintiff, recites a good and valid consideration.

Complaint is made of rulings which prevented defendant from showing, on the cross-examination of plaintiff's husband and her witness Boelker, the extent of their pecuniary interest in the claim litigated. The trial court observed that the husband's interest was apparent. This was so, because as a husband he would naturally take as much interest in his wife's business as if it were his own, and, in this instance, he alone managed and conducted the business for his wife. The witness Boelker frankly stated that he had an agreement to share in the proceeds and offered to state what the agreement was. This did not suit counsel, but he insisted upon some approximate amount. The witness said there were items of expenses to be taken into consideration, and

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he had not computed what his share might be. Counsel had pursued the inquiry as to the interest of this witness to quite an extent, against the persistent objections of plaintiff. The court might well have required a final categorical answer as to the probable amount. But this was discretionary (Gracz v. Anderson, 104 Minn. 476, 116 N. W. 1116), and we fail to see an abuse of discretion.

The telegram, sent to plaintiff on March 7, 1916, stating: "Deal pending if concluded will you accept eight hundred forty-two dollars commission as agreed yesterday wire answer," was properly received. It inferentially refutes the claim now made by defendant that the first contract was canceled by the payment of $432, and that the second never took effect. The admission of this telegram cannot offend against the well known rule that offers of compromise may not be proven against a litigant; for, under the testimony of plaintiff, there had, up to the time of the receipt of the telegram, been no suggestion by the defendant that the second contract was not a binding obligation. At any rate, there was no reversible error in the ruling; for, after defendant's counsel had elicited from Mr. Ellis an explanation of the sending of the telegram, he himself offered it in evidence together with plaintiff's answer.

Error is assigned upon the ruling that the answer was insufficient to admit testimony to show that the contract was obtained through misrepresentation and fraud. Defendant alleged that the signature to the second contract "was obtained by fraudulent concealment of material facts by the plaintiff * * * and that the same was obtained by false and fraudulent misrepresentations made by the plaintiff and her authorized agent concerning the facts of the termination of said sale, by mutual agreement between the plaintiff and this defendant, and alleges that if said F. M. Ellis had been aware of the facts, and not laboring under a mistake of fact induced by the said fraudulent concealment and misrepresentations by the plaintiff and its manager, W. W. Flick, said Ellis would not have signed the same." Defendant seems to admit in his brief that the allegations are insufficient, but contends that evidence of the fraudulent misrepresentations should have been admitted to throw light on other issues. On the oral argument, it was insisted that the pleading was sufficient to let in the defense under the decision of Shaw v. Staight, 107 Minn. 152, 119 N. W. 951, 20 L.R.A.(N.S.) 1077. We

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think the cases not parallel. In the case cited it was alleged that the officers of a corporation fraudulently and unlawfully issued shares of its capital stock to defendants without consideration. For officers of a corporation to issue its shares of stock gratis is a sufficient statement of fact to constitute fraud in law. The general rule is well established that, if a cause of action or defense is to be predicated upon fraudulent representations, the representations must be set forth in the pleading. Cummings v. Thompson, 18 Minn. 228 (246); Kraemer v. Deustermann, 37 Minn. 469, 35 N. W. 276; Johnson v. Velve, 86 Minn. 46, 90 N. W. 126; Loveland v. Gravel, 95 Minn. 135, 103 N. W. 721; section 669, Dunnell, Minn. Pl. But, even were defendant's contention correct that fraud is sufficiently alleged, or that the allegation thereof in general terms could only be taken advantage of by demurrer or by motion, before trial, to make the pleading more specific, it is not in a position, we think, to ask for a new trial in this court. Neither by offer of proof nor in the offer to amend the answer did it indicate wherein the fraud or misrepresentations consisted. Unless it is made to appear that there probably is a meritorious defense on the ground of fraudulent representations, the parties should not be put to the expense of another trial.

A careful examination of the errors assigned and discussed fails to reveal any valid legal ground for granting a new trial.

Order affirmed.

STATE v. MOSES GILLER.[1]

November 23, 1917.

No. 20,579.

Property — constructive possession.

1. The constructive possession of property as defined in the books is a fiction of the law, and as applied to movable chattels, except in attachment, garnishment or other special proceedings, theoretically places the property with the person of the legal owner at his domicile.

[1]Reported in 165 N. W. 132.

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Criminal law — shipment of game — venue.

2. A person who receives into his possession at his place of residence or business, contraband game in violation of the laws of the state, and at that place ships the same to a purchaser at a distant point in the state, commits a crime in so doing, subjecting himself to prosecution in the county wherein such shipment was so made.

Same — constructive possession.

3. He is not subject to prosecution in a county through which the shipment may pass en route to destination on the theory that he was in constructive possession of the contraband articles in such county, where he does not accompany the shipment.

Same — statute.

4. Section 4765, G. S. 1913, defining the word "possession" as used in the regulatory game statutes was not intended as fixing the venue in prosecutions for a violation of the statute, nor to change the place of trial as fixed by section 9196, G. S. 1913.

Defendant was found guilty by a justice of the peace of Itasca county of having unlawfully in his possession and control five round undressed white fish, and was fined $50 and costs. From the judgment of conviction defendant appealed to the district court for that county. The appeal was heard before Wright, J., who at the close of the testimony denied defendant's motion to dismiss the proceeding, and a jury which found defendant guilty as charged in the complaint. From an order denying his motion for a new trial, defendant appealed. Reversed.

E. O. Hagen, for appellant.

Lyndon A. Smith, Attorney General, *James E. Markham,* Assistant Attorney General, and *Ralph A. Stone,* County Attorney, for respondent

BROWN, C. J.

Defendant resides at Crookston, in Polk county, where he is engaged in the business of buying and selling frozen fish and other articles of trade. The "Cash Market" is a copartnership engaged in the retail provision trade at Hibbing in St. Louis county. On February 24, 1917, defendant in fulfilment of an order therefor shipped three boxes of fish by the Great Northern Express Company from Crookston to the Cash Market at Hibbing. The order for the fish called for 100 pounds each of

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pickerel, pike and whitefish and the shipment was made up of three separate boxes of the weight stated. The consignment was f. o. b. at Crookston. While in transit and at Grand Rapids, in Itasca county, the fish were seized and taken from the possession of the carrier, and condemned as contraband by a deputy state game warden, acting under the authority conferred by G. S. 1913, § 4767, on the ground that a part of the whitefish were under the size and weight permitted to be taken from the waters of the state by section 4873, and that the shipment thereof was a violation of section 4906. The game warden was acting within the line of his duty as imposed by the statute just cited.

Thereafter a warrant for the arrest of defendant was sworn out before a justice of the peace of Itasca county, therein charging him with having the fish in his possession in that county with intent to sell the same; all in violation of and contrary to the statute in such case made and provided. Defendant was arrested under the warrant and taken before the justice and after a trial found guilty and sentenced to pay a fine of $50 and costs. He appealed to the district court upon questions of law and fact, and on trial in that court was again found guilty. He moved on various grounds for a new trial and appealed from an order denying it.

At the conclusion of the trial in the district court defendant moved to dismiss the prosecution on the ground, among others, that no offense was shown to have been committed in Itasca county, and that therefore the court was without jurisdiction. The motion was denied and defendant duly excepted to the ruling. Defendant assigns the ruling as error on this appeal, and thereby is presented the only question we deem it necessary to consider; our conclusion thereon being that the objection to the jurisdiction was well taken and should have been sustained by the court below.

Section 4873, G. S. 1913, provides that no person shall at any time catch, kill or have in his possession or under his control for any purpose whatever any fish that are less in weight and size than therein specified. Section 4906 provides that any person who takes, catches or kills, has in his possession, or has in his possession with intent to sell, or sells or offers to sell, or ships by a common carrier any fish taken or caught in violation of section 4873, shall be guilty of a misdemeanor and punished by fine or imprisonment.

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In this prosecution defendant was charged with having contraband fish in his possession in the village of Grand Rapids with intent to sell the same. On its face the warrant sufficiently charged a violation of the statute. But it appears from the record, and there is no dispute about the fact, that defendant was not personally in Grand Rapids at the time stated in the warrant, nor did he at that time or place have actual possession of the fish. On the contrary, they were then in the possession of the carrier and in transit to their destination, Hibbing, in St. Louis county.

It is the contention of defendant that whatever offense may be charged to him by reason of the facts stated was committed in Polk county, at the time he delivered the fish to the carrier for transportation to the consignee at Hibbing, and that he was not guilty of another offense in Itasca county merely because the fish passed through that county en route to destination. We sustain this contention.

The statute on which the prosecution is founded, already referred to, declares the possession or shipment of contraband fish a misdemeanor. The record shows that defendant originally came into the possession of the fish in question at his place of business in Crookston, through a shipment from Canada where they were caught, and that the sale and shipment thereof by him to the Cash Market occurred at his place of business and in Polk county. There can be no question that he then and there violated the statute and subjected himself to prosecution in that county. But the state contends that he also violated the law in Itasca county, and that he was properly proceeded against therein. This is founded on the fact though the fish were shipped f. o. b. at Crookston, which under ordinary conditions would amount presumptively to a surrender of the control of the fish to the carrier as agent of the consignee, yet, as some of the fish were in fact contraband and not the kind ordered by the consignee, the ownership and constructive possession thereof remained with defendant, subjecting him to prosecution in any county into or through which the shipment might pass in transit. In support of this contention the state relies upon that provision found in section 4765, G. S. 1913, wherein it is declared that the word "possession," as used in the game regulatory statutes, shall include both actual and constructive possession, as well as the control of the article referred

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to in connection with the use of the word. The theory of the state is plausible, but we think the definition of the word "possession" as given in the statute can have no particular bearing on the question here presented.

It is probable that by this provision of the statute the legislature intended to reach a case where the real culprit deposits contraband game in a local cold storage plant, or ships it by express or freight and personally accompanies the shipment. But to what further extent the lawmakers intended to go we do not stop to consider, for we are clear that the provision should not be construed as fixing the venue in criminal prosecutions for a violation of the law, or as having been intended to authorize a prosecution in a county wherein there is only a technical constructive possession of contraband game. If we were to sustain the contention of the state, it would necessarily follow that a game warden would have it in his power to fix and determine the venue or place of prosecution in such cases, by seizing the unlawful shipment and instituting a prosecution in a county through which it might pass to destination most suited to his convenience. It seems clear that the legislature did not intend the statute to have that effect. And, moreover, "construtive possession of property," as defined in the books, is a fiction of the law, and thereunder personal chattels wherever their actual situs, remain with the person of the legal owner at his domicile. While as to movable chattels there are exceptions, as applied to special situations, as in attachment, garnishment or other proceedings in which it is sought to subject the property to a particular jurisdiction, we have been cited to no case wherein it has been held that constructive possession in theory of the law carries the person of the owner to their actual situs. The converse of that proposition is the general rule and thereby theoretically the property is at the residence or domicile of the owner. The case might be different in a situation like that here presented if the owner accompanied the shipment.

The case is therefore controlled by section 9196, G. S. 1913, which provides that every criminal cause shall be tried in the county where the offense was committed. For it must be conceded that defendant violated the statute when he shipped the fish in question, and that act took place in Polk county. And there is in the statute no provision

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making a shipment of contraband game an offense in every county through which it may pass. There is such a statute as applied to the crime of larceny, and the thief may be prosecuted in any county into which he may take the stolen property. G. S. 1913, § 8880. But that statute can have no application to the case at bar. Nor are sections 9151 and 9152 pertinent.

We do not question the right of a game warden to seize and condemn contraband game wherever it may be found. That authority is clearly granted by section 4767. But from that it does not follow that the absent constructive or theoretical possessor may be prosecuted at the place chosen by the game warden for the performance of his act of condemnation, to the validity of which a criminal prosecution is not by the statute made necessary.

Order reversed.

HERMAN KRAHN v. J. L. OWENS COMPANY AND OTHERS.[1]

November 23, 1917.

No. 20,586.

Judgment — vacating because of newly discovered evidence — equity.

Courts exercise great caution in granting new trials on the ground of newly discovered evidence. They exercise still greater caution in annulling a judgment on that ground when relief is sought in a separate action after the time for motion for a new trial has expired. Relief of this kind is granted in equity only when it appears clearly that manifest injustice will follow if the relief be withheld. The pleadings and affidavits in this case do not contain sufficient showing for vacation of a former judgment on this ground.

After the former appeal, reported in 136 Minn. 53, 161 N. W. 257, defendant obtained an order requiring plaintiff to show cause why defendant's motion to vacate an order striking out defendant's answer

[1]Reported in 165 N. W. 129.

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should not be granted. The motion was heard by Dickinson, J. From an order denying its motion, defendant appealed. Affirmed.

Francis B. Hart, for appellant.

Cary & Eaton, Glicksman, Corrigan & Gold and *Henry Mahoney,* for respondent.

HALLAM, J.

More than five years after the cause of action arose, three years after the case was tried, nearly three years after a motion for a new trial had been made and denied, more than two years after the order was affirmed on appeal, nearly two years after judgment was satisfied by payment, partly in cash and partly by a note and mortgage, and in this action brought to foreclose that mortgage, the defendant interposed an answer, asking that it be permitted to litigate anew the issues closed these years ago and asking that the court enjoin the enforcement of the note and mortgage and adjudge the repayment of the money paid on the judgment because, it is said, defendant has discovered new facts material to a defense of the case. Plaintiff moved on affidavits that the answer be stricken out as sham and frivolous. The court by order granted the motion. Defendant appealed and the order was affirmed. Krahn v. J. L. Owens Co. 136 Minn. 53, 161 N. W. 257. Thereafter defendant, having obtained leave, moved on additional affidavits for a vacation of the former order striking out the answer. The court denied this motion and defendant appeals.

It is the purpose of our judicial system to give every man his day in court, to afford him a full and fair opportunity to prepare and present his case, and to the end that mistakes may be corrected, ample opportunity is afforded for a review, first by the trial judge, and later by the appellate court, and, if the ends of justice require it, another trial de novo is allowed. These safeguards are important. It is, however, of equal importance that litigation should proceed expeditiously and that parties should understand that, after they have had a fair chance to present their case, the litigation must be considered closed.

One of the grounds for granting a new trial is, "material evidence newly discovered which with reasonable diligence could not have been found and produced at the trial." G. S. 1913, § 7828. Courts are

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justly cautious in granting new trials on this ground. If the new evidence is doubtful in character, not so material as to make probable a different result on a new trial, or merely cumulative or impeaching, relief will be denied, nor will relief be granted, even though very material facts have been brought to light, if they could, by the exercise of proper diligence, have been discovered and presented on the first trial.

After the time for moving for a new trial has expired, a party may, under some circumstances, in a separate action, attack a judgment because new facts have been discovered since its rendition. Plainly still greater caution must be exercised here, for if a defeated party is permitted to open up an adverse judgment whenever his own belated industry or the superior industry of a second attorney discovers facts that would have been of avail on the trial, there would be no certainty to judicial decrees and no end to litigation. "Relief of this kind is granted in equity only when it appears clearly that manifest injustice will follow if the relief be withheld." Krahn v. J. L. Owens Co. 136 Minn. 55, 161 N. W. 257.

The original action was in negligence to recover damages for loss of a leg caused by stepping through a defective removable board on the top of a pea thresher manufactured by defendant. The board was cross-grained and defective. It was claimed in defense that this defect did not cause it to break, but that the board was not in proper position and for this reason slipped off its bearing at one end. This question was fully litigated and the jury found that the board was in place.

Two cleats had been upon this board to hold it in place. The testimony on the former trial was that these cleats were on at the time of the accident. The board was produced on the trial with no cleats on. Plaintiff's witnesses explained this by saying they were taken off after the accident and nailed onto a new board that was substituted in place of the old one. The proposed new evidence relates mainly to this matter. Some is evidence hoped to be elicited from unfriendly witnesses on cross-examination; some consists of reported statements of eye-witnesses who refused to make affidavits; some consists of evidence of witnesses who simply have no recollection of seeing the cleats and believe they were off at the time of the accident; some is evidence that the cleats on the new board were not the same as those on the old one. Some consists

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of the opinions of witnesses who think a cleat could not be used again after once taken off, and some, the testimony of witnesses who tried experiments to demonstrate that this could not be done.

The presence or absence of the cleats had only an indirect bearing on the issues. Their absence at the time of the accident would merely explain defendant's theory that the board slipped. Whether they could be used again after being taken off was quite inconsequential, save that it might have had some bearing on the truth of the explanation of plaintiff's witnesses as to why they were taken off. The proposed evidence, taken all together, is far from decisive of any issue in the case. The main issues to which this proposed evidence relates were fully litigated. All of the proposed evidence might have been obtained on the two trials already had, if defendant and its attorneys had then exercised the same industry as they have exercised these years after the trial. The court should not at this late day vacate the judgment in order to allow defendant another trial upon which to further develop its defense.

Order affirmed.

MARY BEIGLER v. MARSHALL W. CHAMBERLIN.[1]

November 23, 1917.

No. 20,589.

Father's liability for support of abandoned children.

Where a father abandons his minor children and thereby compels their mother, his divorced wife, to care for and support them, the law will imply a promise on the part of the father to reimburse the mother for money spent in doing that which he ought to have done.

Action in the district court for Dodge county to recover $5,600 paid for the care, education and support of defendant's children during seven years. The case was tried before Childress, J., who made findings and

[1]Reported in 165 N. W. 128.

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ordered judgment in favor of plaintiff for $1,600. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Thomas Spillane and *H. J. Edison,* for appellant.

Norton & Norton, for respondent.

QUINN, J.

This is an action by the divorced wife of defendant to recover for money paid by her for the support of their four minor children and to secure some provision for their future support. The cause was tried to the court and judgment ordered in favor of the plaintiff. From an order denying his motion for a new trial defendant appealed.

The plaintiff and defendant were married in March, 1895. There were born to them four children, their ages being 7, 13, 17 and 19 years at the time of the bringing of this action in April, 1916. In May, 1912, the defendant procured a decree of divorce from the plaintiff upon the ground of desertion. The decree made no mention of the children, nor was there any allowance to the wife for any purpose. For some time prior and at all times since the granting of the divorce, the children have been with their mother. It is conceded that the defendant has in no way attempted to gain the possession or custody of any of the children, nor has he in any manner contributed to their support or education, but has always refused so to do, except for a short time while their mother was confined to a hospital in Minneapolis.

Appellant contends that, under the law, the parents are equally liable for the support of their children, and they being under their mother's control, it thereby became her duty to support and care for them; that, in the absence of an express promise to reimburse her therefor, he is not liable; and that, when this duty has been performed by the mother alone, such promise cannot be inferred. With this contention made on behalf of defendant, we are unable to agree.

It does not appear, nor is it material, what the cause of separation between defendant and his wife was. She left the home with her four children, ranging from 3 to 15 years of age. Defendant then obtained a divorce from the mother without mention of the children's names; he never asked for their custody or care, and has persistently refused and neglected to assist in their nurture. It is difficult to understand

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how he could more completely abandon his own children. Primarily it was his duty to support them and give them care and protection, and, if he failed to do his duty in this regard, he would become liable to such persons as did furnish such care, maintenance and protection. The legal duty, in such case, is sufficient to raise an implied promise to make payment for the necessaries of life, whether for food, clothing or care. The plaintiff had no property and was compelled to do common labor in order to care for her children. The defendant had sufficient means for such purpose. We can see no good reason why he should not now be required to recompense the plaintiff for money spent in doing that which he ought to have done.

We hold that, where a father abandons his minor children, as was done in this case, and thereby compels their mother, his divorced wife, to care for and support them, he does not thereby relieve himself from such duty or from his liability for its performance by others. The law will imply a promise on the part of the father to pay for the nurture of his children by their mother. Spencer v. Spencer, 97 Minn. 56, 105 N. W. 483, 2 L.R.A.(N.S.) 851, 114 Am. St. 695, 7 Ann. Cas. 901. In the instant case the trial court found that plaintiff was entitled to recover from the defendant the sum of $250 per year for the six years immediately preceding the commencement of this action, less the sum of $100, paid by defendant, but denied plaintiff's claim for future support.

Affirmed.

JAMES McARDLE v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.[1]

November 30, 1917.

No. 20,363.

Carrier — damage to live stock — verdict not vacated for inadequacy.

1. The verdict is not so clearly inadequate as to justify this court in setting it aside on that ground.

[1]Reported in 165 N. W. 232.

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Appeal and error — harmless error cured by verdict.

2. Where the court instructed the jury that if certain facts were established plaintiff could not recover, a verdict for plaintiff necessarily found that such facts had not been established, and the giving of such instruction, although erroneous, is not ground for reversal.

Same — expression of opinion by trial judge.

3. An expression of opinion by the trial judge as to a disputed fact is not reversible error when the jury did not adopt the view so expressed. Neither was it reversible error to limit the damages recoverable to those which necessarily resulted from the breach of the contract where no claim was made that the damages proven were not the necessary result of the alleged breach.

Action in the municipal court of Waseca to recover $217.85. The facts are stated in the opinion. The case was tried before Childress, J., and a jury which returned a verdict for $50. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Moonan & Moonan, for appellant.

F. W. Root, Nelson J. Wilcox and *Henry M. Gallagher,* for respondent.

TAYLOR, C.

Plaintiff resides four or five miles from Matawan, Minnesota, from which station he occasionally ships live stock over defendant's railway. By previous arrangement, defendant had agreed to furnish him a car on Saturday, February 6, 1915, in which to ship a carload of stock from Matawan to Chicago. He brought his stock, consisting of cattle, sheep and hogs, to Matawan on Saturday, but the station agent, having been informed that the stock train would not run on that day, refused to receive them for shipment on that date, and they remained in the stockyards until the following Monday when they were shipped out, and on Tuesday evening arrived at Milwaukee which was substituted for Chicago as the place of delivery.

If the stock had been shipped on Saturday it would have reached its destination in time to have been placed on the market on Monday, but not arriving until Tuesday evening it could not be placed upon the market until Wednesday. Plaintiff claims that the market price

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on Wednesday was less than the market price on Monday, and that the animals had shrunk in weight, on account of exposure during the delay, much more than they would have shrunk had they been transported promptly.

Plaintiff brought suit for these two items of damage and also for an item of $20 admitted to be due him for two hogs which had been killed, and recovered a verdict for $50. He made a motion for a new trial and appealed from an order denying his motion.

Plaintiff bases his appeal upon the ground that the verdict is inadequate, and that the court erred in its instructions to the jury.

To warrant this court in granting a new trial on the ground that the damages are inadequate, it must so clearly appear that the plaintiff, if entitled to recover at all, is entitled to an amount substantially larger than the jury awarded him that the court can say that the failure of the trial court to grant a new trial was an abuse of discretion. 2 Dunnell, Minn. Dig. §§ 7136, 7141. While, under the evidence presented, the jury could have allowed a larger amount as damages, we are unable to say that such damages so clearly exceeded the amount allowed as to justify this court in setting aside the verdict after it has been approved by the trial court.

The court instructed the jury that defendant was not liable if it had been prevented from shipping the stock on Saturday by a storm or blizzard, and defendant urges this as error, for the reason that no such defense had been pleaded in the answer. It is sufficient to say that, under this instruction, the verdict necessarily found as a fact that defendant had not been prevented by a storm from making the shipment and necessarily eliminated such claim from the case. 2 Dunnell, Minn. Dig. § 7171.

Defendant contended that it had notified plaintiff, before he started to bring his stock to Matawan, not to bring them in on Saturday as they could not be shipped on that day. Plaintiff denied receiving any such notice.

The court instructed the jury to the effect that if plaintiff had received such notice he could recover only for the two hogs which had been killed. Plaintiff insists that defendant could not cancel the contract to furnish the car in that manner, and that this instruction was

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error. But the jury have also eliminated this question by finding the fact to be as claimed by plaintiff; for, under the instruction, they could not return a verdict for more than $20 without finding that plaintiff had not received such notice.

It is urged as error that the judge, in his charge, remarked that he thought it practically undisputed that the notice had been given. But he immediately followed this remark by stating that the burden was upon the defendant to satisfy the jury by a fair preponderance of the evidence that the notice had been given, and that plaintiff was entitled to recover if it had not. For the judge to express an opinion as to a question of fact is not ground for reversal, in a civil action, where the question is left to the jury to determine, especially where, as here, the jury did not adopt the view expressed by the judge. 3 Dunnell, Minn. Dig. § 9785.

Plaintiff also insists that the court erred in charging the jury that the burden was upon him to show that his damages were, "the natural and necessary result" of the breach of the contract; and urges in support of this contention that the damages recoverable are not limited to those which necessarily followed from the breach, but include any other damages which naturally and proximately resulted therefrom. The expression used may not have been quite accurate, but no question was raised at the trial upon which this distinction had any bearing. No claim was made that the damages proven, or any thereof, were not a necessary consequence of the breach of the contract, if in fact there had been an unexcused breach of it. It is clear that no prejudice resulted to plaintiff from this statement. Under such circumstances, the expression used falls within the class of inaccuracies to which attention should have been called at the trial if plaintiff deemed it of any importance.

Order affirmed.

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FRANK E. BURMASTER v. A. J. ALWIN AND OTHERS.[1]

November 30, 1917.

No. 20,434.

Mutual benefit insurance — expulsion of member — construction of by-law — case followed.

Stevens v. Minneapolis F. D. R. Assn. 124 Minn. 381, construing a by-law substantially like that involved in this action, by which the managing officers of the association were empowered to terminate the rights of members therein without notice or opportunity to be heard, followed and applied.

Action in the district court for Hennepin county to recover $10,000 damages for expulsion from membership in Minnesota Commercial Men's Association, one of the defendants, and from the office of director thereof, and to restrain defendants from enforcing the cancelation of plaintiff's benefit certificate and depriving him of his office of director. The answer, among other matters, set out the by-law of the association authorizing the board of directors to suspend or expel any member from the association. The case was tried before Steele, J., who when plaintiff rested denied defendants' motion to dismiss the action, made findings, and ordered judgment reinstating plaintiff and enjoining defendants from enforcing their attempted cancelation of plaintiff's certificate. The jury returned a verdict for $1,000. From an order denying their motion for a new trial, if plaintiff consented to a reduction of the verdict to $500, and from an order for judgment reinstating plaintiff as a member of defendant association and to the office of director thereof, defendants appealed. Affirmed.

M. C. Tifft and *W. B. Anderson,* for appellants.

Laybourn & Cary, for respondent.

PER CURIAM.

The question whether plaintiff's membership in the association was legally canceled is controlled by our decision in Stevens v. Minneapolis

[1]Reported in 165 N. W. 135.

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F. D. R. Assn. 124 Minn. 381, 145 N. W. 35. In that case, as in the case at bar, the by-laws authorizing the suspension of members contained no requirement that notice be given the member proceeded against, or that such member be otherwise afforded an opportunity to be heard before being condemned. We there held that the by-law must be construed in the light of the constitutional right to notice and hearing before one may be deprived of vested legal rights. The cases cannot be differentiated, and we follow and apply the rule there stated. The fact that plaintiff was present at the meeting when his membership was canceled is not important. He was not notified that the matter would be brought up and was given no opportunity to present his side of the controversy. The notice required by the law in such cases is one that will afford a reasonable opportunity to prepare and present a defense.

The question of damages does not require discussion. Though there appears no evidence of actual damage, the trial court charged the jury that if they found that defendants acted maliciously they might award exemplary damages. That instruction is in no way challenged, either by exception taken at the trial, or in the motion for a new trial, and must therefore be taken as the law of the case. 3 Dunnell, Minn. Dig. § 9792. There is evidence in the record from which the jury might well find malice, and the amount of the verdict as reduced by the trial court is within the limits of the jury's discretion in such cases.

Order affirmed.

LESLIE A. FAWKES v. MILAND A. KNAPP.[1]

November 30, 1917.

No. 20,530.

Contract — rescission for fraud — pleading damage.

1. To entitle a party to a contract to rescind the same for fraud and recover back what he paid, it is not necessary that he plead or prove that he was damaged in any particular amount or suffered any real injury.

[1]Reported in 165 N. W. 236.

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Corporation — purchase of stock — fraudulent representations — verdict sustained.

2. The evidence sustains the verdict of the jury finding that the fraudulent representations were made; that they were material; that the plaintiff relied thereon and was induced thereby to enter into the contract, and that he rescinded promptly on learning of the fraud.

Same — action to recover price paid — tender and demand.

3. The tender and demand made were sufficient under the circumstances to entitle plaintiff to maintain the action.

Action in the district court for Hennepin county to recover $4,500. The facts are stated in the opinion. The case was tried before Leary, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for $5,975.25. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Rieke & Hamrum, for appellant.

Charles G. Laybourn, for respondent.

BUNN, J.

In October, 1911, defendant was president, treasurer and manager of Knapp Brothers Starter & Equipment Company, a Minnesota corporation. October 9, 1911, plaintiff purchased through defendant 100 shares of the capital stock of the corporation. In July, 1916, plaintiff claims that he first discovered that defendant sold him his own stock in the corporation instead of treasury stock. Plaintiff thereupon tendered back to defendant the stock so purchased and demanded the return of the price paid, with interest at 6 per cent from October 9, 1911. Defendant refused the stock and the demand, and plaintiff brought this action to recover the amount paid for the stock with interest, on the theory that he had been induced to purchase by the fraudulent representations of defendant, and that he had rescinded the transaction on discovery of the fraud. The case was tried to a jury, and plaintiff had a verdict in the full amount of his claim. Defendant appeals from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

Defendant's first point is that plaintiff neither pleaded nor proved

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a cause of action because he neither alleged nor proved that he was damaged, suffered any real injury by the fraud. But this was not an action to recover damages for deceit. It was simply to recover what plaintiff had parted with, after he had rescinded the contract by his own act. If the representations were made and were material, if without them plaintiff would not have bought the stock, it is not necessary to his right to rescind and to recover back what he parted with that he be damaged in any particular amount, or suffer any real injury. It is sufficient that the representations were material, and that he was thereby induced to part with his money. Martin v. Hill, 41 Minn. 337, 43 N. W. 337; MacLaren v. Cockran, 44 Minn. 255, 46 N. W. 408; Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710; Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

Plaintiff's version of the transaction was this: He was an automobile dealer in Minneapolis and knew defendant well and favorably. The corporation was organized to manufacture and sell a certain electric starter for automobiles. Defendant on numerous occasions solicited plaintiff to buy stock in the corporation. Plaintiff visited the factory of the corporation and investigated the device. Defendant told him that the corporation was going to sell $15,000 or $20,000 worth of capital stock in order to raise money to pay for machinery, already on hand and yet to be delivered, and get started in business. He urged plaintiff to take as much stock as he could. Plaintiff remarked to him that it was unusual to be asked to pay par for stock in a new corporation, but defendant said they were not selling any stock at less than par because that would be illegal, that he could not give him a discount on the stock, but would allow him the amount of defendant's commission.

Plaintiff purchased the stock, giving defendant his check for $5,000. Defendant gave plaintiff his check for $400. Plaintiff's check was made payable to defendant; this was at defendant's request, as plaintiff claims, made on hearing plaintiff direct his bookkeeper to make the check payable to the corporation. Plaintiff testified that defendant said nothing whatever about selling his own stock. This version of the transaction is corroborated by plaintiff's bookkeeper.

Defendant claimed that he gave plaintiff the option to buy treasury stock at par, or defendant's stock at a discount of $400, and that plain-

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tiff elected to buy defendant's stock. It is admitted that the stock sold to plaintiff was in fact stock belonging to defendant, and that the proceeds of the sale never went into the treasury of the corporation.

It is well settled that it was not necessary for plaintiff, in order to have the right to rescind, to prove a fraudulent intent on the part of defendant. If plaintiff, through fraudulent representations or concealment, or through mistake, was induced to buy something materially different from what he intended to buy and believed he was buying, he could rescind on discovering the fraud or mistake. Drake v. Fairmont Drain T. & B. Co. 129 Minn. 145, 151 N. W. 914; Martin v. Hill, supra; Pennington v. Roberge, supra.

We are obliged to hold that the jury was justified in taking as true plaintiff's version of the transaction, rather than defendant's, and in finding that plaintiff was induced by defendant to believe and did believe that he was buying treasury stock, and that his money would go to help the corporation pay for its machinery and get started in business. The jury might well have found the other way, but they did not, and the trial court approved the verdict. It is clearly impossible to say that the evidence is so manifestly and palpably against the decision of the jury that the verdict should be set aside by this court.

We further hold that the jury was justified in finding that whether plaintiff got treasury stock for his money, or stock owned by the defendant, was a matter of material importance to him, and justified in giving credence to his statement that he would not have purchased had he known he was buying defendant's stock. With a corporation just starting to manufacture an article, known to be in need of funds to pay for machinery, it might well be a material matter to the stock purchaser whether his money is going to help the corporation, or going into the pockets of one of its officers. We cannot disturb the finding of the jury that the representations were material, and that plaintiff relied upon them.

It seems rather strange that plaintiff, who served on the board of directors of the corporation, and appears to have been much interested in its affairs, should not have discovered for a period of five years that his money did not go into the treasury of the corporation. But plaintiff testified positively that he did not discover this fact until in July,

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1916, after the company had gone into the hands of a receiver, and an investigation of its books by plaintiff's counsel disclosed no record of the payment of the $5,000. The question whether plaintiff acted promptly after his discovery of the fraud was one for the jury, and there is no ground for holding its decision not justified by the evidence.

Defendant makes a point in regard to plaintiff's tender and demand. The claim is that, when plaintiff tendered back the stock to defendant, the certificates, which were in the name of plaintiff's wife, had not been assigned by her. But the evidence is quite conclusive that defendant had no idea of accepting a return of the stock or paying back the money. He refused, but not on any ground going to the insufficiency of the tender or demand. Under the circumstances there is nothing to the claim. I. L. Corse & Co. v. Minnesota Grain Co. 94 Minn. 331, 102 N. W. 728. This case is also authority for the recovery by plaintiff of interest on the money since the date he parted with it.

In conclusion, we find no ground upon which we can disturb the verdict approved as it has been by the trial court. The questions were all for the jury, and there was ample evidence to sustain the conclusions of that body, if they chose to believe plaintiff and his witnesses rather than defendant and his. The verdict may not be a just one, but it was for the trial court and not for this court, to correct any injustice. It evidently considered that there was none, and we certainly are unable to say that there was any abuse of discretion in denying a new trial.

Order affirmed.

FRANK D. JOCK v. J. C. O'MALLEY.[1]

November 30, 1917.

No. 20,540.

Sale — passing of title — replevin will not lie.

Plaintiff contracted to sell and defendant to buy approximately 80,000 feet of lumber, then piled on a designated tract of land, at $14 per

[1]Reported in 165 N. W. 233.

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thousand feet, mill run, on ground described, terms $200 in cash, balance on or before 60 days from date of contract. Defendant made the cash payment, and with plaintiff's consent took the lumber and hauled it away. The deferred payment not having been made, plaintiff brought this action to replevy the lumber. *Held* that title had passed and replevin would not lie.

Action in replevin in the district court for Pine county, for $50 damages for detention of the property, and in case restitution could not be made for $999,10, the value of the same. The case was tried before Nethaway, J., who at the close of the testimony denied defendant's motion to dismiss the action and a jury which returned a verdict for restitution of the property, and if that could not be had assessed the value at $1,999.10, less $200 already paid. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

Wickersham, Metcalf & Churchill, for appellant.

Ottocar Sobotka, for respondent.

TAYLOR, C.

On May 5, 1916, plaintiff as party of the first part and defendant as party of the second part made the following contract: "The said party of the first part, in consideration of the covenants and agreements of said party of the second part, hereinafter contained, hereby covenants with said party of the second part, that the said party of the first part will sell approximately eighty thousand feet of lumber, consisting of White Pine and Norway Pine, now piled on land described as East Half of North East Quarter, Section 20, Township 44, Range 20, at rate of Fourteen and no/100 Dollars per thousand feet, Mill run, on grounds described heretofore. And the said party of the second part, in consideration of the said covenants of the said party of the first part hereinbefore contained, hereby agrees to and with the said party of the first part, that the said party of the second part will buy approximately Eighty Thousand feet of White Pine and Norway Pine from party of the first part, and will pay for the said lumber at the rate of Fourteen and no / 100 Dollars, per thousand, mill run, on grounds E ½ of NE ¼ 20-44-20. Said payment to be made as follows: $200.00 cash payment on this 5th

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day of May, 1916. Balance to be paid on or before sixty days from date hereof."

At the time of making this contract, both plaintiff and defendant knew that plaintiff had about 80,000 feet of lumber piled upon the land described therein, but neither knew the exact quantity. Plaintiff had previously scaled the lumber, but had not added up his figures to ascertain the exact amount, and did not do so until some time after making the contract. Defendant made the cash payment on May fifth, the date of the contract, and some three weeks later took the lumber, with plaintiff's consent, and hauled it away. Defendant failed to pay the remainder of the purchase price when it became due, and plaintiff brought this action in replevin to recover the lumber. The question presented is whether the title to the lumber has passed from plaintiff to defendant. If it has, replevin will not lie, and plaintiff must seek a different remedy; if it has not, he can maintain this action.

"In contracts for the sale of goods, the test as to whether the title vests immediately in the buyer is the intention of the parties. The rules for ascertaining such intention are well settled, and are, so far as here material, as follows: (a) Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property, unless a different intention appears, passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. (b) Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done." Day v. Gravel, 72 Minn. 159, 75 N. W. 1.

Examining the contract here in question we find: That the sale was unconditional; that it was of specific property—the lumber piled upon a designated tract of land; that the lumber was in a deliverable state; that it was to be taken mill run, that is, as it came from the mill without rejecting any of it on account of grade or quality; and that it was to be taken on the ground, that is that the seller was not to carry it to the buyer, but the buyer was to come and get it. In other words, defendant was to take all the lumber upon the specified tract of land

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as it then was and where it then was, and nothing whatever remained for plaintiff to do.

Defendant attempts to construe the contract to mean that the lumber was to remain on the ground, that is, where it then was, until the entire purchase price had been paid. But the contract will not bear this construction; and, even if it would, plaintiff waived any such claim when he permitted defendant to remove the lumber without objection.

The contract fixed the price at $14 per thousand feet. It specified the number of feet only approximately; but specified the particular lumber sold and the exact quantity was easily ascertainable by measurement. The contract contained no provision as to how, when, where, or by whom, the quantity should be determined; and no provision of any kind indicating that such quantity was to be mutually agreed upon and determined before title passed. Plaintiff states that, when he was informed by defendant that defendant was about to have the lumber scaled, he declined to take part in the making of such scale, for the reason that he had already scaled it himself. A contract of the form here in question is presumed to pass title; and, when plaintiff took the position that the quantity had already been determined, and permitted defendant to take the lumber and haul it away without objection, such presumption became conclusive, and plaintiff foreclosed himself from asserting thereafter that title had not passed. If the lumber had subsequently been destroyed by fire or otherwise, the loss would have fallen upon defendant, not upon plaintiff. Rail v. Little Falls Lumber Co. 47 Minn. 422, 50 N. W. 471; Fredette v. Thomas, 57 Minn. 190, 58 N. W. 984; E. L. Welch Co. v. Lahart Ele. Co. 122 Minn. 432, 142 N. W. 828, and cases cited therein; 24 Am. & Eng. Enc. (2nd ed.) 1051.

It follows that plaintiff cannot maintain an action to replevy the lumber, and the judgment appealed from must be and is reversed.

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FANNY M. KEIPER v. A. R. ANDERSON AND ANOTHER.[1]

November 30, 1917.

No. 20,548.

Death by wrongful act — breach of covenant in lease.

The complaint alleged negligence in the performance by a landlord of his contract with a tenant to keep the leased premises heated, causing the death of the tenant. Though the action is based on the contract and is therefore an action on contract, it is *held* that the complaint states a cause of action to recover damages for the tenant's death as caused by the wrongful acts and omissions of defendants.

Action by the administratrix of the estate of Edward E. Keiper, deceased, to recover $7,500 for the death of her intestate. From orders of the district court for St. Louis county, Cant, J., overruling their separate demurrers to the complaint, defendants appealed. Affirmed.

Francis H. DeGroat and *Brown & Guesmer*, for appellants.

A. Section 8175, G. S. 1913, gives a cause of action only in cases of personal injury caused by a tort, the cause of action for which would abate upon the death of the injured party. It specifies nothing but tort. It does not give the right to assert the cause of action of the injured person, but gives an entirely new cause of action for the benefit of the surviving spouse, under the circumstances specified therein. Anderson v. Fielding, 92 Minn. 42, 50, 51, 99 N. W. 357. See also Clay v. Chicago, M. & St. P. Ry. Co. 104 Minn. 1, 13, 115 N. W. 949.

In some states the statutes for death by wrongful act are survival statutes, whereas in other states, as in Minnesota, the statutes are not survival statutes, but create a new cause of action as shown by Anderson v. Fielding, supra. 8 Am. & Eng. Enc. (2d ed.) pp. 858, 859. This statute was intended to reach cases of tort only.

1. The history of this statute shows that it was designed to give a remedy in tort actions for injuries to the person, to compensate for

[1]Reported in 165 N. W. 237.

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the loss of all remedy by the death of the injured person. The original Lord Campbell's act began by declaring that: "No action at common law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person; and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him." Then it conferred a right of action on the personal representative for the benefit of the wife and others. 8 Am. & Eng. Enc. p. 858.

2. The language of this statute limits it to cases of tort.

3. The statute creates an entirely new and original cause of action, not a new remedy for an existing cause of action (Anderson v. Fielding, supra). That being so, it cannot, consistently with a familiar rule of construction, be extended to any case not falling within its express language, "wrongful act or omission." See Moe v. Smiley, 125 Pa. St. 136, 17 Atl. 228; 8 Am. & Eng. Enc. IV, p. 860; Id. (2) p. 861; Id. p. 887.

4. The death of the alleged wrongdoer causes the action given by the statute to abate (See 8 Am. & Eng. Enc. 874, and Moe v. Smiley, supra).

5. Actions under Lord Campbell's act statutes are governed by the rules which pertain to ordinary tort actions. (See Death by Wrongful Act, 8 Am. & Eng. Enc. 851, et seq. particularly IV, p. 860).

B. There is no duty to heat imposed by law upon the landlord in favor of the tenant, and a failure to heat creates no tort liability in favor of the tenant. It is therefore necessary to show and rely upon a contract obligation and breach thereof. In all cases in which the landlord has been held liable to the tenant for a failure to heat or a failure to repair, the cause of action has been held to be not in tort but on contract and controlled by the rules pertaining to breach of contract. Plaintiff alleges a contract obligation and relies on a breach thereof.

1. The defendants' duty to heat being created by contract and being dependent upon contract, and it being necessary for the plaintiff to plead and prove the contract in order to make out a cause of action, the action is one on contract, no matter what form the complaint takes. Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632; Finch v. Bursheim, 122 Minn. 152, 153, 142 N. W. 143; City of East Grand Forks v. Steele, 121 Minn. 296, 299, 141 N. W. 181.

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2. The plaintiff has in fact proceeded on contract.

3. While a landlord, who has agreed to repair or to heat, can be held liable in tort to a third person, he is under no tort liability to the tenant. Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428; Glidden v. Second Ave. Inv. Co. 125 Minn. 471, 147 N. W. 658.

The authorities in and out of Minnesota, establish beyond question that there is no tort liability on the landlord to his tenant for the breach of the landlord's contract to repair or for the breach of his contract to heat. The holdings are affirmative to the effect that there is no such tort liability to the tenant. 18 Am. & Eng. Enc. 231 (h) aa, 234 ee, and authorities cited; Dustin v. Curtis, 74 N. H. 266, 67 Atl. 220, 11 L.R.A.(N.S.) 504; Sargent v. Mason, 101 Minn. 319, 112 N. W. 255.

In 18 Am. & Eng. Enc. (2d ed.) 226, 235, there is, under the heading "Agreement of Landlord to Repair," a clear summary of the rules and principles applicable in the case of such an agreement.

The decisions in the Glidden heating cases apply to a heating case the well established principles applicable to a repair case, which are: (1) That a third person has imposed in his favor by law a duty on the part of the occupant to keep the premises safely repaired and sufficiently heated; (2) that a violation of that duty, by the one upon whom that duty rests, is a tort by him upon the third party in whose favor this law-imposed duty runs; (3) that if the landlord has not agreed to furnish heat or to repair, then this duty rests upon the tenant, and he is the tort feasor; (4) that the landlord, by an agreement to do the heating, "assumes" this duty imposed by law in favor of the third party; (5) that this duty imposed by law in favor of the third party then rests upon him just as if it had been upon him in the first instance; (6) that when he fails to furnish heat he violates that duty imposed by law in favor of the third party which he has thus assumed, and there is committed by him upon the third person a tort, and not a breach of contract, because the third person has no contract. The third person stands on the duty imposed by law and the breach thereof. Glidden v. Goodfellow, 121 Minn. 101, 144 N. W. 428; Glidden v. Second Ave. Investment Co. 125 Minn. 471, 473, 147 N. W. 658.

If the third person did not have imposed in his favor by law this

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duty, he would have no cause of action at all. No one else who has not imposed in his favor by law this duty to heat, has any cause of action in tort, in the event of failure to heat or repair. Therefore, the tenant, who has no duty to heat or repair imposed in his favor by law has no cause of action in tort in the event of a failure to heat or repair; and he has no cause of action whatever unless he happens to have a contract with the landlord wherein the latter agrees to heat, and then his remedy is for breach of contract. He stands in a position different from the third person in this: The third party has imposed in his favor by law a duty to heat and repair always resting upon someone (the tenant or the landlord or both); the tenant has no such duty imposed in his favor by law resting upon anyone.

It will be noted, in reading the Minnesota repair decisions, that they are all actions by someone other than the tenant of the defendant, excepting the cases of Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466, and Farley v. Byers, 106 Minn. 260, 118 N. W. 1023; and that, in each case, the holding of tort liability was based upon the ground that there had been violated some duty imposed by law (which would have existed even though no contract had been made) in the injured party's favor, and that the contract had no effect except to bring about an assumption of this law-imposed duty. Nash v. Minneapolis Mill Co. 24 Minn. 501; Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289; Good v. Von Hemert, supra; Williams v. Dickson, 122 Minn. 49, 141 N. W. 849.

Drill & Drill, for respondent.

Where the landlord by the terms of his lease covenants with the tenant to properly heat the leased premises and negligently fails to do so, or performs the act of heating in a negligent manner and the tenant is injured by reason of such negligence, the tenant has a cause of action against his landlord for damages for his personal injuries resulting proximately from such negligence. Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428.

The issues raised by these demurrers, therefore, are not new or open to question, because in Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466, the court clearly decided the matter and determined that a ten-

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ant, like any other person rightfully on the leased premises and free from contributory negligence and assumption of risk, has an action for damages from personal injury caused by the negligence of the lessor in performing his undertaking to heat or repair under a covenant to do so.

The complaint alleges that the defendants were negligent and perpetrated acts of misfeasance and wrong in the manner in which they carried out, performed and executed their undertaking to heat the leased premises, and that the plaintiff's intestate was exposed to harm and danger which were the proximate cause of his death and which such alleged negligence and misfeasance directly produced. The complaint, therefore, tenders an issue on matters which, if true, constitute actionable negligence in law and in fact.

The action set up in the complaint is independent of the contract of leasing, as a matter of fact.

BUNN, J.

The defendants demurred separately to the complaint on the ground that the facts stated did not constitute a cause of action. Both demurrers were overruled, and the court certifying that the questions presented were in its opinion important and doubtful, each defendant appealed from the order overruling his demurrer.

Plaintiff is the widow and administratrix of the estate of Edward E. Keiper, deceased, and brings the action under G. S. 1913, § 8175, to recover damages for his death on the theory that it was caused by the wrongful acts or omissions of the defendants. The allegations of the complaint, which are essential to an understanding of the questions involved, may be stated as follows:

Defendant A. R. Anderson was the owner of a certain store building in Minneapolis. March 14, 1914, he leased the premises to Edward E. Keiper, for the term of one year, for use as a drug store. By the terms of the lease the lessor agreed "to keep said premises heated to a comfortable and proper temperature from October to April of each year, inclusive." The lessor maintained a heating plant in the basement of the building; defendant Arthur W. Anderson was in charge of the heating plant, as the agent of the lessor. Keiper went into possession

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of the store. From December 27, 1915, to January 14, 1916, the weather was intensely cold. Notwithstanding the terms of the lease, and their duties and obligations in the premises, the defendants "carelessly and negligently failed to properly attend to the * * * heating plant," failed to keep the same in a good working condition and free from obstructions, failed to keep fuel in the same, and negligently allowed the fire in said furnace to go out, or to get so low as to allow the premises to become cold and dangerous as to the occupancy thereof by the tenant and his licensees. This condition is alleged to have existed during the last days of December; on the thirtieth plaintiff contracted a severe cold, became ill and was obliged to remain at his home for several days. On January 3, he returned to work at the store, relying upon promises of the defendants to do better. He remained there until January 11, when defendants carelessly and negligently allowed the heating plant to become cold for lack of fuel, causing the premises to become so cold that Keiper became ill, repaired to his bed, and died June 24, 1916, of the illness so acquired. It is unnecessary to further state the allegations of the complaint, except to say that negligence and carelessness on the part of the defendants is frequently alleged as the cause of Keiper's death.

Defendants claim that the action will not lie because it is on contract, not in tort, and because the statutory action to recover for death caused by wrongful act or omission can be maintained only when the cause of action is in tort.

Had Keiper survived, his cause of action would have been for breach of the contract to heat the premises, as proof of the contract would have been necessary to create any cause of action. This is settled in this state. Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Sargent v. Mason, 101 Minn. 319, 112 N. W. 255; City of East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181, 45 L.R.A.(N.S.) 205, Ann. Cas. 1914C, 720; Finch v. Bursheim, 122 Minn. 152, 142 N. W. 143; Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428, L.R.A. 1916F, 1073.

It is just as true that the present action is based on the contract; there could be no recovery except for the contract. Though negligence or wrong-doing be alleged, the action is founded on contract, and there-

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fore classed as one, in substance, on the contract. Whittaker v. Collins, supra. In the cases cited it was necessary to call the action either one in tort or one on contract in order to decide which of two rules applied; in Whittaker v. Collins, supra, whether it was necessary to join all parties jointly liable; in Sargent v. Mason, and City of East Grand Forks v. Steele, what the proper measure of damages was; in Finch v. Bursheim, what statute of limitations applied. Of these cases perhaps Sargent v. Mason is most directly in point, as that action was based on the failure of a landlord to perform his contract to heat the leased premises. This court granted a new trial because the trial court gave the jury the rule of damages applying to torts, instead of that applying to breach of contract.

All the numerous allegations of negligence and wrong-doing in the complaint before us come to but one point, the failure of the landlord to heat the premises as he had agreed to do. The gist of the action is the breach of the contract, and as said in Whittaker v. Collins, supra, "it is in substance, whatever may be the form of pleading, an action on the contract." The cases of Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289; Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466, and Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428, L.R.A. 1916F, 1073, are not in conflict with this view. There was no contract relation in those cases between the injured person and the landlord. In the Barron case the plaintiff was sublessee of the tenant, in the Good case a member of his family, and in the Glidden case an employee. The liability of the landlord was in each case based on his negligence. See note to Dustin v. Curtis, 11 L.R.A.(N.S.) 504.

How far is this decisive of the question whether the complaint shows that the death of plaintiff's intestate was caused by the "wrongful act or omission" of defendants? Counsel for defendants insist that no action for death by wrongful act will lie unless the wrongful act or omission is a tort, negligence, unconnected with contract. They say that an act or omission is not wrongful, does not constitute negligence, unless it is a breach of some duty imposed by law, not merely one imposed by contract. They point out that the right of action given by the statute is a new and distinct right of action, not a survival of the right of action which the injured person had before his death, to recover

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damages. This is correct under our decisions. Anderson v. Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. 665; State v. District Court of Hennepin County, 131 Minn. 96, 154 N. W. 661. See note to Rowe v. Richards, in L.R.A. 1915E, 1095, in which the author expresses the opinion that "the better rule will be found to be that based upon the theory that the cause of action is the injury to the person of the deceased for which coexistent remedies, or an exclusive remedy, is given." This means that the cause of action under the death statute remains the same cause of action that the injured person had before his death, the statute merely giving a new remedy. Such a rule would be a help in determining whether, when the cause of action survives, two actions may be maintained, one that of the estate of the deceased, the other that of the widow and next of kin. It might also be useful in a case such as Rowe v. Richards, 32 S. D. 66, 143 N. W. 664, L.R.A. 1915E, 1069, where the South Dakota court held that a release by the injured person did not bar an action after his death brought under the statute for the benefit of the widow and children. See also note to Lhota v. Oppenheimer, L.R.A. 1915E, 1104. Edwards v. Interstate Chemical Corp. L.R.A. 1916D, 121.

But it is unnecessary to pursue this subject. Its chief importance here is with reference to the point that Keiper's cause of action, being based on breach of contract, survived his death. That is used as an argument in favor of the contention that the present action cannot be maintained. But whether the premise is sound or not, we find little weight in the argument. The books are full of cases where a right of action exists both under survival statutes and under statutes patterned after Lord Campbell's Act. Neither Keiper in his lifetime nor his personal representatives brought an action to recover damages for personal injuries. Whether such an action may still be maintained we need not consider.

Returning to the argument which is the real basis of counsel's contention that the action will not lie, that is that the wrongful act or omission, or negligence, must be a breach of a duty imposed by law, not merely one imposed by contract. While, as we have held, the action is for breach of contract, the complaint abounds in charges of negligent and wrongful acts and omissions of the defend-

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ants. It alleges that Keiper's death was caused by these acts and omissions. Unless we can say that this cannot be, because there was no breach of a legal duty, it is apparent enough that the action will lie. The language of the statute is that where "death is caused by the wrongful act or omission of any person," the action may be maintained. Counsel cites some authorities to support this position. In Clark v. Gates, 84 Minn. 381, 87 N. W. 941, Justice Lovely used this expression: "To constitute a tort the act or omission must be entirely independent of contract right." Citing 1 Hilliard, Torts (4th ed.) 1. That was said in connection with the question for decision in that case, whether the evidence showed fraud, or merely a breach of contract. It is doubtless true that the word "tort," as well as the word "wrongful," usually signifies a breach of legal duty, independent of contract rights. But this is by no means always true. Take such contract relations as carrier and passenger, physician and patient, attorney and client, landlord and tenant; when there is actual negligence or wrong on the part of the carrier, physician, attorney or landlord, is it not still negligence or a wrong notwithstanding that the duty is imposed by the contract? There may be a breach of a contract without negligence, but there may be negligence or wrongful acts or omissions in the performance of a contract. It seems to us to make no difference whether the duty to use due care is one imposed directly by law, or exists because of the contract relation of the parties. We are unable to see why the complaint in this case does not allege negligence on the part of defendants, and that Keiper's death was caused by their wrongful acts and omissions.

We do not find support for the proposition of defendants' counsel that because the duty breached by defendants was one imposed by contract, this action will not lie. It is difficult for us to distinguish the multitude of cases where recovery has been allowed for the death of passengers, though no liability could exist except for the contract. And there have been cases where the liability of a physician or surgeon for the death of a patient caused by his negligence has been upheld. 30 Cyc. 1578. Murdock v. Walker, 43 Ill. App. 590; Gores v. Graff, 77 Wis. 174, 46 N. W. 48; Staloch v. Holm, 100 Minn. 276, 111 N. W. 264, L.R.A.(N. S.) 712, was a death case, and it apparently did not occur to the court that there was any doubt the action would lie. The same may be said of

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Martin v. Courtney, 75 Minn. 255, 77 N. W. 813; 87 Minn. 197, 91 N. W. 487. These cases are significant in view of the settled rule in this state that such an action is for breach of contract. We have found no malpractice case where a recovery for death has been denied on the ground that the statutory action could not be maintained.

As to the relation of landlord and tenant we have been able to find no cases where a recovery was sought for death caused by a failure to keep a promise to repair or to furnish heat. The cases previously cited, Barron v. Liedloff, Good v. Von Hemert and Glidden v. Goodfellow, indicate pretty clearly the position of this court that there may be such a thing as negligence in the performance of a contract duty.

Our conclusion is that we should not say, taking allegations of the complaint as true, that the death of plaintiff's intestate was not caused by the wrongful acts or omissions of the defendants. What the evidence will show we have no means of knowing. It may show no negligence, or contributory negligence. We simply hold that the complaint states a cause of action.

Order affirmed.

BROWN, C. J. (dissenting).

I am unable to concur in the decision in this case and therefore respectfully dissent. The sole question presented, stated in a word, is whether the next of kin of a deceased person may maintain an action in tort under the death-by-wrongful-act statute for an act, alleged to have caused his death, which as to decedent amounted to nothing more than a breach of contract. In my opinion the question should be answered in the negative.

It seems well settled by the authorities that where the act constituting a breach of contract is one of misfeasance because prohibited by statute, or because a violation of some duty or obligation imposed by law as incident to particular contract relations and in addition to those expressly stipulated by the parties, the injured party has the election to sue in tort or for a breach of the contract as he deems best suited to appropriate and adequate relief. But where the act is one of nonfeasance, mere negligence unaccompanied by affirmative unlawful acts, the exclusive remedy

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is for a breach of the contract. Tuttle v. George H. Gilbert Mnfg. Co. 145 Mass. 169, 13 N. E. 465; Lane v. Raynes, 223 Mass. 514, 112 N. E. 152; Flint & Walling Mnfg. Co. v. Beckett, 167 Ind. 491, 79 N. E. 503, 12 L. R. A. (N.S.) 924; Dustin v. Curtis, 74 N. H. 266; 67 Atl. 220, 11 L.R.A.(N.S.) 504, 13 Ann. Cas. 169; Mulvey v. Staab & Co. 4 N. M. 172, 12 Pac. 699; Samuel v. Novak, 99 Md. 558, 58 Atl. 19; Nevin v. Pullman P. C. Co. 106 Ill. 222, 46 Am. Rep. 688. The doctrine is stated with citation of authorities in the note to Flint & Walling Mnfg. Co. v. Beckett, 12 L.R.A.(N.S.) 924. Bishop, Non-Contract Law, § 76. It was applied by this court in Sargent v. Mason, 101 Minn. 319, 112 N. W. 255, an action like that at bar for the failure of the landlord to heat the rented premises.

In this case the complaint brings the action within the nonfeasance rule, there being no allegation therein showing anything more than a negligent failure to perform the contract. The obligation violated was imposed by express contract stipulation, not by the law, and decedent, had he survived, could have recovered only for the breach of the contract. And in this respect it is unimportant in what language the breach of the contract is charged, since the complaint as a whole discloses simply a failure to perform and nothing more. And since the sole remedy of decedent would have been for a breach of the contract, his personal representatives or next of kin have no greater right under the wrongful death statute, for the intent of that law was to extend to them the same right that was vested in decedent at his death. McLean v. Burbank, 12 Minn. 438 (530), wherein Mr. Justice Berry said in the course of the opinion therein: The natural construction of this language would appear to be that the representatives may maintain their action for the same kind of act of omission, causing death, for which the intestate might have maintained an action had the resulting injury fallen short of death." While a new action is given by the statute, one that did not exist prior to its enactment, it is founded wholly upon a right possessed by decedent, namely, a right of action in tort, and not in contract. That right and only that right passes by the statute to the next of kin. An attempt to proceed under the wrongful death statute for the failure of the landlord to perform the conditions of the lease was unsuccessful in Davis v.

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Smith, 26 R. I. 129, 58 Atl. 630, 66 L. R. A. 478, 106 Am. St. 691, 3 Ann. Cas. 832.

The demurrer to the complaint should be sustained.

HOLT, J.

I concur in the views of the Chief Justice.

ANNIE G. HALL v. HENRY HOLLAND.[1]

November 30, 1917.

Nos. 20,564.

Abandonment of homestead — lien of judgment.

1. Where plaintiff ceased to occupy her homestead for 16 consecutive months, and failed to file a notice with the register of deeds, describing the premises and claiming the same as her homestead, she is deemed to have abandoned the same, and a judgment of record in the county attaches as a lien against the same after the lapse of 6 months from the time plaintiff ceased to occupy the premises.

Same — evidence of intention to return excluded.

2. It was not error, under the proofs in this case, to exclude testimony as to the intent of the claimant to return and retain the premises in question as her homestead.

Action in the district court for Ramsey county to restrain defendant from proceeding with an execution sale of plaintiff's homestead. The answer denied that plaintiff occupied the property as her homestead and averred that, from the time of its purchase up to the summer of 1916, plaintiff did not use or occupy it as her homestead, but occupied another residence in the city of St. Paul, and that it was subject to the lien of the judgment described in the complaint. The case was tried before Dickson, J., who made findings and ordered judgment in favor of defendant. From an order denying her motion for a new trial, plaintiff appealed. Affirmed.

John A. Pearson, for appellant.

Daniel J. Hollihan, for respondent.

[1]Reported in 165 N. W. 235.

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QUINN, J.

Action to restrain defendant from proceeding with an execution sale of plaintiff's homestead. At the conclusion of the trial, the district court dissolved the temporary writ and denied the relief asked for. From an order denying her motion for a new trial plaintiff appealed.

In May, 1911, plaintiff purchased a house and lot at 104 Snelling avenue, in the city of St. Paul, which she, with her two minor sons, occupied as a homestead until April, 1915, when she went to keep house for her sons on Cook street, one of the sons having engaged in business near that place. The plaintiff rented her home on Snelling avenue, retaining a key to the dwelling and reserving the third floor thereof in which she left some of her household effects. She kept house for the boys and helped about the store until June, 1916, when she undertook nursing about the city. According to her own testimony she did not return to her place on Snelling avenue to remain over night or to occupy the same, otherwise than to leave her few belongings in the room on the third floor, until in September, 1916, when she and one of the boys returned and slept there a portion of the time, and she was living there at the time of the execution levy thereon, which is here in question. No notice of plaintiff's claim of her homestead rights was ever filed in the office of the register of deeds of the county, as permitted by section 6963, G. S. 1913.

The defendant held a judgment in the sum of $784.65 and accrued interest, against the plaintiff and her deceased husband, and on October 31, 1916, caused execution to issue thereon. The sheriff of the county levied upon the premises to satisfy such execution, and the temporary injunction issued herein was served on December 18, 1916.

Upon the trial the plaintiff offered to show her financial condition, and that it was her intention during all the times subsequent to her leaving the premises in May, 1915, to return to and retain the same as her homestead. Upon objection this testimony was excluded.

The trial court, in its decision, found that plaintiff was entitled to no relief; that defendant's judgment against plaintiff was a lien upon the property; that the property may be sold to satisfy the lien, and that the temporary injunction be dissolved.

The plaintiff was unfortunate, if she wished to retain the premises as

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her homestead, not to have filed a notice claiming the same as her homestead, as required by the statute. Section 6963, G. S. 1913, provides, in part, as follows:

"But if he shall cease to occupy such homestead for more than six consecutive months he shall be deemed to have abandoned the same unless, within such period, he shall file with the register of deeds of the county in which it is situated a notice, executed, witnessed, and acknowledged as in the case of a deed, describing the premises and claiming the same as his homestead. * * *"

The result of the failure to file such notice is inevitable. Plaintiff had ceased to occupy the premises from April, 1915, to September, 1916, a period of about 16 months.

The judgment became a lien against the property upon the lapse of 6 months from the time plaintiff ceased to occupy the same, and the fact that she returned and made it her home after an absence of 16 months, but before the levy under the execution, does not defeat the lien. Where there has been a loss of exemption of a homestead by abandonment, a resumption of occupancy as a home does not have a retroactive effect, but merely gives a new right as of the date of the resumption. Clark v. Dewey, 71 Minn. 108, 73 N. W. 639.

While it is proper, speaking generally, to allow proof of a homestead claimant's intention to return and retain the premises as a homestead, yet in this case the plaintiff's own testimony was conclusive against her, and the exclusion of the proof of her intention was without prejudice to her rights.

Affirmed.

WILLIAM MARKS v. EDWARD P. BROWN AND OTHERS.[1]

November 30, 1917.

Nos. 20,583.

New trial — admission of prejudicial evidence — discretion of court.

1. In holding prejudicial an error in admitting certain evidence and

[1]Reported in 165 N. W. 265.

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granting a new trial on that ground the trial court did not abuse its discretion.

Evidence — question for the jury.

2. The evidence was not conclusive in favor of the verdict rendered.

Two actions in the district court for Hennepin county, one by William Marks, as father and natural guardian of Irvin Marks, to recover $10,000 for injuries received by his son when run over by defendant's delivery wagon; the other to recover $5,000 for loss of the services of his son during his minority. The answers alleged negligence of the parents in permitting the child to wander unattended on the busy city street mentioned in the complaint. The case was tried before Steele, J., who denied the motion of defendants for an instructed verdict in each case, and a jury which returned in each case a verdict in favor of defendants. From an order granting plaintiff's motion for a new trial, defendants appealed. Affirmed.

Frank H. Wadsworth and *A. R. Taylor,* for appellants.

C. M. Bracelen and *Neil M. Cronin,* for respondent.

BUNN, J.

These actions, one by plaintiff as father and natural guardian of his minor son, the other by plaintiff in his own right, were tried together in the court below. The liability of defendants was predicated upon alleged negligence of a servant of defendants, the driver of one of their milk wagons, resulting in injury to plaintiff's minor son, a boy three years old. There was a verdict for the defendants in each case. On motion of plaintiff the trial court set aside these verdicts and granted a new trial. The order recites that the motion was granted on the ground of errors of law occurring at the trial. The memorandum states that the only ground upon which the motion is granted is the one that relates to the evidence admitted going to show that the driver was a careful driver and that he never had accidents before. This is the only error relied on here to sustain the order appealed from.

It is conceded that it was error to admit the evidence referred to. Defendants claim that the error was without prejudice, both because of the improbability that the admission of this evidence affected the

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verdicts, and because the evidence as a whole was insufficient to warrant any verdicts other than those rendered.

We would have sustained the trial court if it had denied a new trial, but it by no means follows that we cannot sustain the order granting one. It is hardly necessary to refer to the large discretion in the trial court in determining the probable effect on the jury of an erroneous ruling. We cannot say that the court abused this discretion in the present case.

Plaintiffs did not make a strong case, and the verdicts were probably right, but an examination of the record discloses evidence, which, if believed, made a case for the jury. On the whole we feel unable to say there was no prejudice in the error.

Order affirmed.

MARY POWERS v. OLE O. WILSON.[1]

November 30, 1917.

Nos. 20,592.

Negligence — contributory negligence — damages excessive.

In this action to recover for personal injuries sustained by plaintiff in a collision with defendant's automobile, it is *held*:

(1) The evidence was sufficient to take to the jury the questions of the negligence of the driver and the contributory negligence of plaintiff, and to sustain the verdict for plaintiff.

(2) The damages are excessive.

(3) A claim of error in the charge considered and not sustained.

Action in the district court for Ramsey county to recover $31,300 for injuries received when struck by an automobile belonging to defendant and driven by his son. The answer alleged that plaintiff's injuries were caused solely on account of her own negligence. The case was tried before Dickson, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict

[1]Reported in 165 N. W. 231.

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for $12,500. From an order denying his motion for judgment notwithstanding the verdict and for a new trial, defendant appealed. Affirmed on condition plaintiff consented to a reduction of the verdict to $10,000.

Denegre & McDermott and *Harry S. Stearns,* for appellant.

John J. Kirby, for respondent.

BUNN, J.

Plaintiff sustained personal injuries by being run down by defendant's automobile, driven by his son, and in this action to recover damages for such injuries, received a verdict of $12,500. The case is before us on defendant's appeal from an order denying his motion for judgment notwithstanding the verdict or a new trial.

There is no claim that defendant is not responsible for the negligence of his son. It is contended that the evidence of negligence on the part of the son was not sufficient to take that issue to the jury, that plaintiff was guilty of contributory negligence as a matter of law, and that the damages are excessive. There is also a claim of error in the court's charge.

A brief statement of the facts follows: Plaintiff was employed at a factory on the south side of University avenue just west of Syndicate avenue in St. Paul. On September 6, 1916, at about 9 p. m. she left her work to go to her home which was north of University avenue, crossing that street near the west side of Syndicate avenue. Other employees of the factory left at the same time. As plaintiff came to University avenue she looked both ways, saw lights in both directions some distance away, and proceeded to cross the street. She succeeded in crossing the two street car tracks in safety, and was then struck by defendant's automobile coming from the east, driven by defendant's son, a young man of 17. It was a rainy night. The wind shield of the car was in place, so covered with mist that the driver could see little through it. The lights of the automobile were dim, and not of much assistance to the driver in his view ahead, or much of a warning to pedestrians. There was evidence that the car was being driven at a speed of 20 or 25 miles an hour. The driver testified that he did not see plaintiff or any of the people on or near the crossing, though there were several there. The horn was not sounded. The force of the impact threw plaintiff

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violently to the pavement; the car ran some 80 feet before it was stopped.

The evidence was amply sufficient to make the question of the driver's negligence one for the jury, and to justify the verdict on this issue. We reach the same conclusion on the question of contributory negligence.

The question of damages is troublesome, as it frequently is in these cases. Plaintiff was 29 years of age, and was earning $30 per month. Her injuries were serious. She was confined to the hospital for 17 weeks and to her bed at home 3 or 4 weeks more. After this and up to the time of the trial some 8 months after the accident plaintiff was able to get about on crutches. She sustained a spiral fracture of the upper end of the right femur near the hip. There was a union, but one leg is an inch and a quarter shorter than the other, and plaintiff will limp through life. She has suffered much pain. But we do not understand that she is incapacitated from earning a living at the work she was accustomed to do. We think the verdict is too large, and that it ought to be reduced.

Error is assigned in the court's giving to the jury the statutory provisions as to lights on automobiles at night, and as to slowing down and giving signals when approaching pedestrians. It is claimed that there was no evidence that the statutes or any of them had been violated. We do not sustain this contention.

The order appealed from is affirmed on condition that plaintiff, within 10 days after the remittitur goes down files her consent to a reduction of the verdict to $10,000. If such consent is not filed, a new trial is ordered.

MATHIAS H. WOLD v. OLE O. WOLD AND ANOTHER.[1]

November 30, 1917.

Nos. 20,596.

Trial — amendment of findings before judgment or appeal.

1. The trial court may at any time before judgment, and before

[1]Reported in 165 N. W. 229.

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the cause has been removed from its jurisdiction by appeal, amend its findings of fact and conclusions of law, even though the result thereof be an order for judgment the reverse of that ordered by the original findings.

Will — enforcement of contract to devise — rescission.

2. In an action to enforce a contract by which defendants agreed to make plaintiff their heir at law, and to leave to him at their death all their property, in consideration that plaintiff would become a member of their household and render and perform such services and labor as would be expected from a natural son, it is, *held*:

(1) That the evidence supports the findings of the trial court, and that the conclusions of law are sustained by the findings of fact.

(2) A contract of the kind stated is continuing in character and an attempted renunciation thereof by the promisor does not set in motion the statute of limitations.

(3) The promisee in such case may act upon such repudiation and sue at once to protect his rights, or he may delay such suit until the happening of the event, the death of the promisor, that would vest in him the rights secured by the contract.

Action in the district court for Goodhue county to enforce an alleged contract to adopt plaintiff, to adjudge plaintiff to be the owner of certain premises, subject to the life estate of defendant Wold, and to restrain the latter from selling the property. The answer of defendant Wold set up the statute of limitations. The case was tried before Converse, J., who made findings and ordered judgment dismissing the action. Plaintiff's motion for amended findings was granted and the court ordered judgment in favor of plaintiff. Defendants' motion for further amended findings or for a new trial was denied. From the order denying their motion, defendants appealed. Affirmed.

Andrew Finstuen and *Mohn & Mohn,* for appellants.

A. J. Rockne, for respondent.

BROWN, C. J.

Action for the enforcement of an alleged adoption contract, and for a decree adjudging plaintiff to be the heir at law of defendant Ole O. Wold, and of his wife, Sigried Wold, now deceased. Plaintiff had judgment as prayed for in his complaint, and defendants appealed from an order denying their motion for amended findings or a new trial.

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The action was tried by the court without a jury. The findings and evidence disclose the following facts, stated without unnecessary detail: The Wolds were without children and resided alone upon a farm in Goodhue county, the title to which prior to her death became vested in Mrs. Wold. Plaintiff was the son of a neighbor and of the age of 6 years in 1871. His mother died about that time, and his father, a cripple. was unable to properly care for the family. At some time in the year stated, the precise date is not material, plaintiff was by his father given into the Wold family which, as will presently appear, became his home for the succeeding 28 years. The evidence tends to show that the boy was a gift to the Wolds and was gladly accepted by them. In 1881, when plaintiff was about 16 years of age, his father determined to get his family together and move to North Dakota, there to take a government homestead and make a home for the future. He went to the Wolds and made known his intentions and asked for the return of his son, that he might go to Dakota with the other members of the family. The Wolds protested against surrendering or giving him up and insisted upon retaining him as a member of their household. Some discussion followed and finally, in consideration of their right to retain plaintiff, the Wolds agreed to adopt and make him their heir at law, and leave their property to him at their death. Upon this promise the father relinquished his paternal rights and surrendered the plaintiff to the Wolds, as a member of their family, and he thereafter performed such labor and services as would be assigned to and expected of a natural son. At the suggestion of the Wolds he changed his name to Wold, and still retains it. He was treated by the Wolds as their son, he called them father and mother and a bond of affection sprang up between them, which continued for many years and until the estrangement which caused a severance thereof presently to be mentioned. The farm upon which the Wolds resided was purchased from one Betcher and had not been paid for at the time of this agreement. Plaintiff voluntarily contributed toward the payment of the purchase price the sum of $1,000, received by him for services rendered away from the Wold home. The court found this fact, though the evidence tends to show that during the time plaintiff remained with the Wolds he contributed from his earnings from others considerably more than that amount. In fact he seems to have turned

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over to the Wolds practically all his earnings, as well as his time, labor and services. This situation continued until plaintiff was 34 years of age, at which time he married a young woman who was not satisfactory to the Wolds, and in the words of the trial court "he was driven from the Wold home in anger." This occurred in the year 1899, and plaintiff never thereafter returned to the Wold home until after the death of Mrs. Wold, which occurred in 1915, and then only for a temporary purpose. No settlement was ever made for any service rendered by him or contributions made to the Wolds, though plaintiff made demand therefor a short time prior to the commencement of this action. The court found that at the time plaintiff was driven out the Wolds renounced, repudiated and denied any and all obligations toward him, "stated in public many times that the plaintiff would get none of their property, all of which was * * * well known to plaintiff." The court further found in paragraphs numbered 17, 18 and 19, that plaintiff at the time he left the Wold home abandoned all claims against them, and accepted their renunciation of all obligations toward him as final; that the cause of action set forth in the complaint was barred by the statute of limitations, and that the plaintiff had lost his rights by laches.

Upon the facts so found the court held that plaintiff was not entitled to recover, and the conclusions of law were that he take nothing by the action and that it be dismissed with costs to defendants.

Thereafter plaintiff moved to amend certain of the findings of fact, to strike out those in reference to abandonment, the statute of limitations and laches, and for an amendment of the conclusions of law so as to award judgment for plaintiff. After hearing the parties, and on what appears to us a further painstaking and impartial consideration of the case, the court struck out the findings just referred to, and amended the conclusions of law so as to order judgment to the effect that plaintiff was entitled to a decree awarding to him the rights of an heir in and to the property of the Wolds, and for the costs of the action. Defendants then moved in the alternative for certain amendments of the findings or a new trial. This motion was in all things denied and defendants appealed.

The assignments of error present four principal questions, namely: (1) Whether the court was without authority to amend the conclusions

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of law by changing the order for judgment in favor of defendants to one in favor of plaintiff; (2) whether the amended findings support the amended conclusions of law; (3) whether plaintiff's claim is barred by the statute of limitations; and (4) whether the evidence is sufficient to support the findings of fact. The questions will be disposed of in the order stated. None require extended discussion.

1. By the first decision filed by the trial court the action was ordered dismissed with costs to defendants. That conclusion as we understand the record was based upon the findings to the effect that plaintiff, long prior to the death of Mrs. Wold, abandoned all claims to any share in the Wold property, and that his rights were barred by the statute of limitations, or lost by laches. But on plaintiff's motion for amended findings, by which the findings just mentioned were challenged as not justified by the evidence, the court concluded, after further consideration of the evidence, that the findings were not sufficiently supported and they were stricken out. Thus disappeared from the record the basis for the conclusions of law directing a dismissal of the action, and our only inquiry is whether the court had authority to amend the conclusions of law to make them respond to the facts as they remained after the elimination of those just mentioned. We think the question should be answered in the affirmative. No judgment had been rendered in the action at the time of the amendment nor had the cause been removed from the jurisdiction of the trial court by appeal. That the court has jurisdiction and authority in such case upon proper occasion to change its mind, and order an amendment which will change the result formerly ordered seems clear. 8 Standard Enc. Pr. 1066; State Sash & Door Mnfg. Co. v. Adams, 47 Minn. 399, 50 N. W. 360; 3 Notes on Minn. Reports, 649; Hurley v. City of West St. Paul, 83 Minn. 401, 86 N. W. 427; Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057. Whether the court would have the right to make such change after judgment, and whether the remedy in that situation of the case would be a new trial, we do not consider as the question is not presented.

2. The facts found by the trial court are stated substantially in the outline of the case, and that they fully support the amended conclusions of law there can be no serious doubt. The necessary conclusion from the facts so found, as illuminated by the evidence, is that the Wolds promised

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and agreed in return for the right to retain plaintiff as a member of their home, and for such service as he might thereafter render them, to give to him at their death all their property, and to take such action in their lifetime as would be necessary to make him their heir and bring about that result. The findings are not in this precise language, but such was the view taken by the trial court of the evidence, as appears from the memorandum attached to the final order for judgment, and that conclusion the evidence fully supports. The parties clearly did not contemplate a formal court proceeding for an adoption by order or decree at any particular time. They were not familiar with the law upon the subject. What they intended was that plaintiff, in consideration of the facts stated, should be entitled to and have the Wold property at their death. The contract was suffciently shown, and there was a performance by plaintiff. The fact that when he married contrary to the wishes of the Wolds they repudiated the contract and publicly declared that he should have none of their property, does not change in any material respect the situation; the Wolds could not thus escape from the obligations imposed upon them by the contract. Plaintiff did not abandon the Wolds; on the contrary, the Wolds abandoned him. So the contention that the facts as found do not sustain the amended conclusions of law is not sustained.

3. It is contended that whatever right plaintiff ever had under the contract accrued at the time of the separation between the parties, which took place in 1899, when the Wolds, by reason of their dissatisfaction with plaintiff's marriage, renounced any and all obligations to him, and declared that he should not at any time receive any part or portion of their property. The contention is that plaintiff could, at that time, have maintained an action to enforce his rights, and that his failure to do so for more than 6 years fully sustains the plea of the statute of limitations and is a complete bar to the present suit. In this we do not concur. The contract as disclosed by the findings and evidence was continuing in character, plaintiff at no time abandoned the same, and the Wolds, at some time during their life were under obligation in some form to make plaintiff their heir and the legal successor to their property and property rights. Plaintiff was not required to proceed prior to the happening of the event which would vest him with the rights of an heir, namely, the death of the Wolds, though the situation might be different

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had he breached the contract, and refused performance on his part. The renunciation and repudiation made by the Wolds did not operate to set the statute of limitations in motion, and the right of suit continued though plaintiff could have proceeded earlier had he so elected. 1 Wood, Limitations (4th ed.) 119a (5); Henry v. Reed, 80 Kan. 380, 103 Pac. 846; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. ed. 953.

4. The last contention, namely, that the evidence is insufficient to support the verdict is not sustained. The case in its principal facts is not different from like cases heretofore presented. Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4, 43 L.R.A. 427, 74 Am. St. 490; Malone v. Malone, 88 Minn. 418, 93 N. W. 605; Schmitt v. Schmitt, 94 Minn. 414, 103 N. W. 214; Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031; Hayes v. Hayes, 26 Minn. 389, 148 N. W. 125; Drager v. Seegert, 138 Minn. 6, 163 N. W. 756; Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455. A general statement of the case has been made and the facts there outlined are supported by sufficient competent evidence, a discussion of which will serve no useful purpose. It is sufficient to say that the record has been carefully read with the result stated. The evidence of the contract and agreement is direct, and the question is not left to conjecture or speculation. The principal witness and the one who testified directly to the contract, as made by the parties in 1881, was a sister of plaintiff. Her relationship was not a disqualification (Drager v. Seegert, supra), and whether she was worthy of belief was a question for the trial court. We discover no sufficient reason for holding that her testimony should be rejected. She was corroborated by declarations of the Wolds made to various parties, long after the date of the transaction, to the effect that plaintiff was their son, and was to have their property when they died. And taking the evidence as a whole it is not such as to justify interference by this court.

Order affirmed.

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STATE EX REL. GEORGE B. NIENABER v. DISTRICT COURT OF RAMSEY COUNTY AND ANOTHER.[1]

November 30, 1917.

No. 20,698.

Workmen's Compensation Act — assistant to driver within act.

1. Relator was engaged in the retail sale and delivery of coal and other fuel; one of his wagons loaded with coal for delivery to a purchaser became mired and the team hitched thereto was unable to remove it; the driver in charge thereof requested plaintiff, who was passing the scene, to assist in releasing the wagon, and in complying with the request plaintiff was injured.

It is *held* that, though not otherwise in relator's employ, plaintiff was its servant and employee in rendering the assistance stated; that the driver in charge of the wagon so mired had implied authority to employ him for the temporary purpose, and plaintiff is entitled for the injury suffered by him in rendering the assistance to appropriate relief under the Workmen's Compensation Act.

Same — compensation authorized.

2. The compensation allowed by the trial court is within the evidence and justified by the statute.

Upon the relation of George B. Nienaber the supreme court granted its writ of certiorari directed to the district court for Ramsey county and Honorable Charles S. Haupt, one of the judges thereof, to review the proceedings in that court under the Workmen's Compensation Act brought by John Antil, as employee, against the City of St. Paul and George B. Nienaber, as employers. Affirmed.

Raymond N. Caverly, for relator.

C. B. Schmidt, for respondents.

BROWN, C. J.

Certiorari to review a judgment in proceedings under the Workmen's Compensation Act.

[1]Reported in 165 N. W. 268.

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The facts are not in dispute and are as follows:

Relator, defendant in the proceeding, was at the time in question engaged in the coal and fuel business in the city of St. Paul, and in the conduct thereof had in his employ drivers who with teams and wagons owned by relator carted and delivered coal and other fuel to customers residing in various parts of the city. On June 9, 1917, one of relator's wagons, loaded with coal for delivery, became so mired in the mud of one of the outlying streets that the horses were unable to move it. Plaintiff was in the employ of the city as a street sprinkler, driving his own team. In the course of his work he came up to the mired load of coal, and at the request of relator's driver attempted to assist in getting the same out of the mud. To that end he hitched his team in front of the team attached to the coal wagon, and in urging the horses forward one of them stepped upon and crushed and seriously injured plaintiff's foot and ankle.

The trial court found on the facts stated that relator's driver had implied authority, in the emergency confronting him, to employ plaintiff for the service stated, and that by the employment plaintiff became for the time being an employee of relator and entitled to the benefit of the statute. Compensation was awarded accordingly.

The majority of the court concur in the conclusion of the trial court. The driver of the coal wagon was engaged in the discharge of the duties of his employment, was confronted with an emergency, relief from which required assistance, and was within his implied authority in employing plaintiff to render the necessary help. The service rendered, though casual standing alone, was in the usual course of relator's business, and therefore within the statute. Paul v. Nikkel, 1 Cal. I. A. C. 648; Ginther v. Knickerbocker Co. 1 Cal. I. A. C. 458. As to the implied authority of the driver and the relation thereby created between plaintiff and relator, see Gunderson v. Eastern Brew. Co. 71 Misc. 519, 130 N. Y. Supp. 785; Brooks v. Central Sainte Jeanne, 228 U. S. 688, 33 Sup. Ct. 700, 57 L. ed. 1025. The compensation awarded, namely, $9 per week during the period of disability, not exceeding 300 weeks, is within the evidence, and the assignments of error challenging the same are not sustained.

From the conclusion that plaintiff by the facts stated became an

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employee of relator within the meaning of the compensation act, and therefore entitled to compensation for the injury received by him, I respectfully dissent. In my view of the matter, in assisting relator's driver out of the mire, plaintiff acted the part of the Good Samaritan, a kindly volunteer, and not as an employee of relator within the meaning of the compensation act.

Judgment affirmed.

NESTOR KANGAS v. STANDARD ACCIDENT INSURANCE COMPANY.[1]

December 7, 1917.

No. 20,475.

Accident insurance — construction of policy.

The insured was accidentally hurled against and under a passing train of cars, and thereby sustained injuries resulting in the loss of his left arm and the fingers of his right hand. *Held* to be but one accident and one loss, within the meaning of an accident insurance policy, for which he was entitled to the full monthly accident indemnity provided for in the policy, during total disability not exceeding 48 months.

Action in the district court for St. Louis county to recover $1,920 upon an accident insurance policy. The answer alleged that by the terms of the policy plaintiff was not entitled to recover indemnity as set forth in the complaint, and that defendant was ready and willing to pay plaintiff such indemnity as he was entitled to. The case was tried before Cant, J., who denied defendant's motion to direct a verdict in favor of plaintiff for $50 and granted plaintiff's motion to direct a verdict for $162.05. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Abbott, MacPherran, Lewis & Gilbert, for appellant.

John Jenswold and *John D. Jenswold,* for respondent.

[1] Reported in 165 N. W. 268.

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QUINN, J.

By this action the plaintiff seeks to recover, upon an insurance policy, a monthly indemnity of $40 from the date of his injury to November 7, 1916, the date of the commencement of this action. At the conclusion of the trial the district court directed a verdict in favor of the plaintiff for the amount asked. Defendant moved for judgment notwithstanding the verdict, which was denied. Judgment was entered and defendant appealed.

There is no controversy over the facts. May 25, 1916, defendant issued a policy insuring the plaintiff against loss resulting from injury sustained by external violence, and against loss resulting from sickness contracted during the life of the policy. July 7, while walking along a railroad track, the plaintiff met a freight train moving at a high rate of speed. He stepped to one side between the main track and a side track where a box car was standing, when in some unaccountable way he was caught and accidentally hurled against and under the passing train in such manner that his left arm was so crushed and his right hand so mangled that it became necessary to immediately amputate all of the fingers of the right hand and the left arm near the shoulder. He remained under the care of a physician for 50 days. He was totally and permanently disabled. The decisive question is: Did the total disability give rise to a monthly accident indemnity within the meaning of the policy, or is the plaintiff limited to an indemnity for the specific loss of his left hand, under the provisions of Part II of the policy?

The indemnity for loss resulting from bodily injury sustained through external, violent and accidental means is provided for by the provisions of Parts I, II and III of the policy, which are as follows:

PART I. SCHEDULE OF INDEMNITIES.

Principal Sum One Hundred Dollars ($100), Monthly Accident Indemnity Forty Dollars ($40), Monthly Sickness Indemnity Forty Dollars ($40).

PART II. ACCIDENT INDEMNITY—SPECIFIC LOSSES.

If any one of the following specific losses shall result necessarily

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and solely from such injury as heretofore described, within ninety days from the date of the accident, indemnity will be paid as follows:

a. For Loss of Life, The Principal Sum.

b. For Loss of Both Hands or of Both Feet or One Hand and One Foot (all by complete severance at or above the wrist or ankle), or for the Irrecoverable Loss of the Entire Sight of Both Eyes, The Prinicipal Sum.

c. For loss of Either Hand or of Either Foot (by complete severance at or above the wrist or ankle), One-half the Principal Sum.

d. For the Irrecoverable Loss of the Entire Sight of One Eye, One-third of The Principal Sum.

Not more than one of the indemnities provided in this Part II will be paid on account of loss resulting from any one accident. The occurrence of any loss for which indemnity is payable under this Part shall at once terminate this insurance.

PART III. MONTHLY ACCIDENT INDEMNITY.

Indemnity under this Part shall not be paid for any disability resulting from loss for which provision is made in Part II.

a. TOTAL DISABILITY. If such injury as heretofore described alone shall immediately and continuously disable and prevent the Insured from performing any and every duty pertaining to his occupation or business, the Monthly Accident Indemnity as provided in Part I will be paid for the period of such disability not exceeding forty-eight consecutive months.

b. PARTIAL DISABILITY. Or, if such injury as heretofore described alone shall at once after the happening thereof or after a period of total disability continuously disable and prevent the Insured from performing work substantially necessary to his occupation or business, one-half the said Monthly Accident Indemnity will be paid for the period of such disability not exceeding six months; provided, however, that the combined period for which indemnity is payable under Paragraphs a and b of this Part shall not exceed forty-eight months from date of injury causing the loss."

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The appellant contends that the testimony shows that the plaintiff met with two accidents and suffered two distinct injuries; that the injury which resulted in the loss of the left hand occurred prior to the injury to the right hand, and that the plaintiff is entitled to indemnity only for the loss of the left hand, because the policy provides that the occurrence of any loss for which indemnity is payable under Part II shall at once terminate the insurance.

Upon an examination of the policy and a consideration of the testimony, we find but little difficulty in arriving at the conclusion that there was but one accident and one injury, within the meaning of the insurance contract. The fact that, while he was struggling to save his life underneath the moving train, the plaintiff's left arm was crushed a moment before his right hand was mangled, cannot within reason be said to constitute two accidents and two distinct injuries. For instance, if, when the plaintiff was drawn underneath the passing train, a car wheel had passed over his hand thereby severing his four fingers, one at a time, could it be said that the event constituted four accidents and four distinct injuries to his body? We are of the opinion that the plaintiff met with but one accident and sustained but one loss, within the meaning of the policy.

While Part II contains the following clause:

"Not more than one of the indemnities provided in this Part II will be paid on account of loss resulting from any one accident. The occurrence of any loss for which indemnity is payable under this Part shall at once terminate this insurance,"

yet this provision has no application to the facts of the case under under consideration. It will be observed that, under the policy in question, the loss of the entire sight of one eye would constitute a specific loss for which the indemnity would be one-third the principal sum. So would the loss of one hand constitute a specific loss for which the indemnity would be one-half the principal sum. But if the policyholder were so unfortunate as to lose both an eye and a hand in the same accident, he could probably, under the above provision, recover for but one loss and further insurance would cease.

It is also argued that indemnity under Part III should not be paid for any disability resulting from loss for which provision is made in

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Part II. The difficulty with this contention is that in the case at bar the loss is the entire left arm and the fingers of the right hand, and we fail to discover, under the head of specific losses, any reference to such a loss. We do, however, find provision for indemnity for total disability in paragraph a of Part III, which provides a monthly accident indemnity of $40 for the period of disability not exceeding 48 consecutive months.

Suppose, instead of losing the fingers of his right hand, respondent had, in addition to the loss of his left arm, sustained an injury to his spine which produced an immediate and total paralysis of the lower part of his body and destroyed the use of both feet. An accident policy which would not, in such a case, afford indemnity for the whole loss would be a delusion and a snare. We hold that the injury and loss of the insured entitle him to indemnity under paragraph a of Part III of the policy.

Affirmed.

JOSEPH NOTARO v. MORRIS MANDEL AND OTHERS.[1]

December 7, 1917.

No. 20,545.

Negligence — contributory negligence — questions for jury.

In this action to recover damages for injuries sustained in a collision at a street intersection, the evidence made defendants' negligence and plaintiff's contributory negligence questions of fact for the jury. This court cannot hold the damages, approved by the trial court, excessive.

Action in the district court for Hennepin county to recover $2,500 for personal injuries received in a collision. The answer alleged failure of plaintiff to exercise the care of an ordinarily prudent person for his own safety. The case was tried before Dickinson, J., and a jury which returned a verdict for $1,500. Defendant's motion for judgment not-

[1]Reported in 165 N. W. 267.

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withstanding the verdict or for a new trial was denied. From the order denying their motion for a new trial, defendants appealed. Affirmed.

D. E. La Belle and *Mathias Baldwin,* for appellants.

Larrabee & Olson, for respondent.

PER CURIAM.

The assignments of error attack the verdict on these grounds: (a) The evidence fails to establish defendants' negligence; (b) it does disclose plaintiff's contributory negligence as a matter of law; and (c) the amount is excessive.

On a May afternoon of last year plaintiff was riding his bicycle going west on Sixth avenue north, a street running east and west in the city of Minneapolis and along which a double track street car line is operated. As plaintiff was approaching Oak Lake avenue, a street leading into Sixth avenue north from the north, one of the defendants, driving a horse and wagon of the partnership at a brisk trot going east on Sixth avenue north, was nearing Oak Lake avenue. Shortly before the latter reached the westerly line of Oak Lake avenue, if extended across Sixth avenue north, he swung the rig across the street car tracks and towards the nearest or westerly corner of Oak Lake avenue, intending to drive north thereon. At about the same time that the horse came within a few feet of the corner mentioned, plaintiff reached the same position with the result, as plaintiff claims, that he was run into by the neck and shoulder of the horse and pitched off his bicycle, striking against the lamp-post at the corner with such force as to break his lower jaw in two places. Defendants' contention was that the horse did not get within four feet of plaintiff, who, in trying to get around in front of the horse, ran the bicycle against the curb causing his fall against the lamp-post. The evidence was such that the jury could readily find that the horse came against plaintiff, who at the moment of collision was on that part of the street where he had a right to be, and that defendants' rig came improperly and negligently into a part of the street where it had no business to go so long as another vehicle was rightfully there. It is clear to us that defendants' negligence and plaintiff's contributory negligence were, under the evidence, jury questions, properly

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submitted, and correctly determined. No good purpose would be served by an attempt to further state or analyze the testimony.

The injury was severe, necessitating painful surgical treatment. Full recovery has not yet been attained. The amount incurred for the doctor's services and hospital expenses exceeds $200. It cannot be said that the amount of the verdict, $1,500, is so excessive that this court must therefrom draw the inference that the jury were actuated by passion or prejudice notwithstanding the trial court's concluaion to the contrary.

Order affirmed.

ALMA OLSSON v. MIDLAND INSURANCE COMPANY.[1]

December 7, 1917.

No. 20,558.

Insurance — material misrepresentations in application.

1. Representations that the insured had not had fits or hernia or received medical or surgical attention within five years are material under a statute avoiding a policy for misrepresentations which "materially affected either the acceptance of the risk or the hazard assumed."

Same — evidence not conclusive.

2. The evidence does not conclusively show that the representation that the insured had not had fits or hernia was false.

Same — same.

3. The evidence does not conclusively show that a representation that the insured had not received medical or surgical attention within five years was false.

Same — same.

4. The evidence does not conclusively show that statements contained in the application of the insured to the effect that he had never had fits or hernia and had not received medical or surgical attention within five years were knowingly made.

[1]Reported in 165 N. W. 474.

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Same — insured not charged with knowledge of representation.

5. That a copy of the application is attached to the policy as is required by statute, and retained by the insured, does not as a matter of law charge him with knowledge of the representations written therein or estop his beneficiary from showing that they were not in fact made.

Same — liability for suicide when insane.

6. Under an accident policy silent as to the effect of suicide the insurer is liable though the insured committed suicide if at the time he was insane.

Same — judgment notwithstanding the verdict error.

7. The evidence did not conclusively show that the insured knowingly made false representations as to hernia, fits or medical or surgical attention and judgment for the defendant notwithstanding the verdict for the plaintiff should not have been entered.

Action in the district court for St. Louis county to recover $1,000 upon defendant's policy of insurance. The facts will be found in the opinion. The case was tried before Cant, J., and a jury which returned a verdict for the amount demanded. Defendant's motion for judgment notwithstanding the verdict was granted. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

W. H. Gurnee, for appellant.

Benton & Morley and *Crassweller, Crassweller & Blu,* for respondent.

DIBELL, C.

This is an action on a health and accident policy issued by the defendant to Bert Olsson. The plaintiff, his wife, was the beneficiary. There was a verdict for the plaintiff. Upon the defendant's alternative motion for judgment or a new trial judgment notwithstanding the verdict was ordered. From the judgment the plaintiff appeals.

The policy was issued on August 4, 1914. On December 25, 1915, Olsson came to his death from a gunshot wound. The defendant claimed that Olsson in his application made false representations, with intent to deceive, and of a character avoiding his policy, in these respects: (a) That he had never had hernia; (b) that he had never had fits; (c) that he had not received medical or surgical attention

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within five years. The plaintiff denied that such representations were false, or that they were knowingly made. As a further and independent defense the defendant claimed that Olsson committed suicide. The plaintiff denied this and alleged that if he did he was insane at the time. The court charged the jury that the alleged representations were material under the statute, and left it to them to say whether they were knowingly made, and whether they were false; and it instructed them that the fact that Olsson committed suicide did not prevent a recovery if he was insane at the time. The verdict was general. Upon the record presented the judgment is right if any one of these representations was material within the meaning of the statute, and was knowingly made, and if it was false; or, regardless of these, if Olsson committed suicide, unless he was insane at the time. The motion for judgment was granted upon the ground that certain of the representations were false and were knowingly made. In the review on appeal it should be in mind that the jury found against the defendant; and the question is whether the evidence is such as to justify a judgment notwithstanding the verdict.

1. The statute applicable to false statements in a policy is as follows:

"The falsity of any statement in the application for any policy covered by this act shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer." G. S. 1913, § 3527.

If Olsson made any of the representations charged falsely, with intent to deceive, or, regardless of such intent, if such false representation affected either the acceptance of the risk or the hazard assumed, the plaintiff cannot recover. See Johnson v. National Life Ins. Co. 123 Minn. 453, 144 N. W. 218, Ann. Cas. 1915A, 458, and cases cited. The question of fraudulent intent is not material for consideration upon this appeal. Evidence of it is very slight, in fact there is none at all except by way of inference, and it is not claimed to be conclusive or at most more than a question for the jury. Besides if the representations were material in fact, as we hold, the question of intent to deceive becomes unimportant. The representation that the insured never had fits was material. See Rey-

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nolds v. Atlas Acc. Ins. Co. 69 Minn. 93, 71 N. W. 831. And so was the representation that he had not received medical or surgical attention for five years. See Rupert v. Supreme Court U. O. F. 94 Minn. 293, 102 N. W. 715; Silverstein v. Knights & Ladies of S. 129 Minn. 340, 152 N. W. 724; Wheelock v. Home Life Ins. Co. 115 Minn. 177, 131 N. W. 1081. Of course in a particular case the attention might be so slight and of so little bearing upon the acceptance of the risk or the hazard as to be negligible. Whether the representation as to hernia was as a matter of law material is of greater doubt. It appears that policies are written, though the application discloses hernia, with a rider attached excepting liability for an injury arising because of it. The evidence upon the point is meager and the question has not been particularly considered by counsel. In this state of the record we hold the representation material.

2. The evidence does not conclusively show that Olsson was suffering from hernia or from fits or had been affected with either when he made his application. It would sustain a finding that he was. It sustains a finding that he was not. The burden was upon the defendant.

3. A physician testified that he treated Olsson medically and surgically some 50 or 60 times within the year prior to his application. This is the only evidence of medical or surgical attention and if true it is enough. The physician kept no record of his treatments or of dates. Olsson's wife received treatments from the same physician about the same time. The physician did not mention to her that her husband was receiving treatments. She never heard of her husband consulting the physician. He did not tell her. The question is whether the evidence so conclusively shows that Olsson received treatments from the physician that it must be so declared as a matter of law upon a motion for judgment notwithstanding.

The doctrine in this state, in harmony with the holdings elsewhere, is that uncontradicted testimony which is unimpeached and not improbable cannot be arbitrarily disregarded but must be given effect. Second Nat. Bank of Winona v. Donald, 56 Minn. 491, 58 N. W. 269; 1 Moore, Facts, § 66, et seq., and cases cited. But a jury is not bound to accept testimony as true, merely because uncontradicted, if im-

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probable, or where the surrounding facts and circumstances or what is developed on cross-examination furnish reasonable grounds for doubting its credibility. Hawkins v. Sauby, 48 Minn. 69, 50 N. W. 1015; Anderson v. Liljengren, 50 Minn. 3, 52 N. W. 219. In Burud v. Great Northern Ry. Co. 62 Minn. 243, 64 N. W. 562, Justice Mitchell said: "The fact that there is no conflict in the testimony does not make the case one for the court instead of the jury, if the evidence is for any cause inconclusive in its nature as, for example, where different conclusions may be reasonably drawn from it, or where its credibility is doubtful." The principle was recently applied in Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827, to the testimony of an interested witness. The burden of proof was upon the defendant. Olsson is dead and the testimony of the physician cannot be directly met. It is not corroborated and is perhaps weakened by the fact that no record was kept. This unexplained the jury might think unusual. Again the jury might think it unlikely that so many treatments would have been given without Olsson's wife learning of them either from her husband or the physician who was also her physician or by other means. The evidence is persuasive that Olsson received medical attention as the physician claimed. The question before us is whether it so conclusively appears that he did that it could be so declared on a motion for judgment notwithstanding. We are of the opinion that it is not of that conclusive character.

4. Olsson's application was taken by the district manager of the defendant. It contains 17 statements some of them including many separate facts. It is conceded that the manager did not read all of them at length. He assumed to give the substance of some of them or perhaps to call attention to portions which he deemed material. One of them, that relating to other insurance, was not read but the manager having in possession the information made the statement as he understood it should be. In general the printed statements furnished by the company ended with the phrase "except as herein stated," and the words "no exceptions" were added in writing. This was the language and in the writing of the manager. Olsson was a Swede, 24 years old, and came to this country when 16. He probably read English

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with some difficulty. The manager had general charge of the solicitors in the district and the writing of applications was a matter of daily routine. There was no actual purpose on his part to deceive. However, he and the company were after business. They were winning Olsson away from a company in which he was carrying similar insurance which the manager when representing that company had written and which had lapsed but was subject to reinstatement. The only testimony as to what occurred was that of the manager and he was interested. From all the circumstances the jury were justified in believing that the statements were passed over lightly by the manager, that they were met by a general statement on the part of Olsson that he was all right or that nothing was the matter with him, without an appreciation of their real significance, and that with such general statement the defendant chose at the time to be satisfied. In making out the application the manager was the agent of the company and not of the insured. Kausal v. Minn. F. M. F. Ins. Assn. 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; Otte v. Hartford Life Ins. Co. 88 Minn. 423, 93 N. W. 608, 97 Am. St. 532. The question presented is whether from the evidence the jury must find that the representation was knowingly made. In some respects the case resembles Price v. Washington Life Ins. Co. 92 Minn. 251, 99 N. W. 810, where the question was held for the jury. And see Clark v. North American Union, 179 Mich. 131, 146 N. W. 336. We are of the opinion that the question was one of fact.

5. A copy of the application was attached to the policy as required by statute and was delivered to the insured. This fact, while a circumstance to be considered in determining whether the insured knew the statements made in the application, does not alone and as a matter of law charge him with them. Some statements in Reynolds v. Atlas Acc. Ins. Co. 69 Minn. 93, 71 N. W. 831, are urged to that effect. Whatever the rule is elsewhere we do not understand that in this state the mere retention of the policy to which a copy of the application is attached, with no other circumstance affecting the result, estops the insured or his beneficiary as a matter of law from asserting that the statements contained in it were not his representations. See Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850; Otte v. Hartford Life Ins. Co

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88 Minn. 423, 93 N. W. 608, 97 Ann. St. 532; Price v. Standard Life & Acc. Ins. Co. 90 Minn. 264, 95 N. W. 1118; Note 67 L. R. A. 734, et seq. The facts before us do not create an estoppel as a matter of law.

6. The defendant contends that the evidence conclusively shows that Olsson committed suicide. There is a presumption against suicide. That he came to his death by a bullet wound is undisputed. There is testimony, not very strong, that he claimed at the time that he had been waylaid and shot. The evidence that he committed suicide is quite convincing. The defendant sufficiently sustained the burden of proof. For the purposes of this appeal we assume but we do not hold that it was conclusively shown that he committed suicide.

There is no suicide provision in the policy. In the case of an ordinary life policy, payable to a beneficiary, without a provision as to the effect of suicide, the law of this state permits a recovery even in the event of suicide when sane. Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162; Kerr v. Minnesota M. B. Assn. 39 Minn. 174, 39 N. W. 312, 12 Am. St. 631; Vance, Ins. 516; 2 Bacon, Life & Acc. Ins. (4th ed.) § 440. We assume without deciding that this rule does not apply to an accident policy. The rule is universal, in any event, that a suicide when insane does not prevent recovery unless expressly so provided in the policy. Scheffer v. National Life Ins. Co. of U. S. 25 Minn. 534; Cotter v. Royal Neighbors, 76 Minn. 518, 79 N. W. 542; Robson v. United Order of Foresters, 93 Minn. 24, 100 N. W. 381; Blackstone v. Standard Life & A. Ins. Co. 74 Mich. 592, 42 N. W. 156, 3 L.R.A. 486; Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 185, 30 L. ed. 740; Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295; Tuttle v. Iowa State Traveling Men's Assn. 132 Iowa, 652, 104 N. W. 1131, 7 L.R.A. (N. S.) 223; 2 Bacon, Life & Acc. Ins. (4th ed.) § 530, et seq.; Richards, Ins. (3d ed.) § 367; 1 May, Ins. (4th ed.) § 323; Vance, Ins. 568; Kerr, Ins. 394; 1 Am. & Eng. Enc. (2d ed.) 313; 1 C. J. 443. Conceding that Olsson came to his death by suicide, the evidence, which it is unnecessary to review, sustains a finding that he was insane at the time. The court submitted the question of suicide and insanity along the lines stated and the defendant cannot complain.

7. The judgment was directed notwithstanding the verdict upon the ground that certain of the representations mentioned were material

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under the statute, and we hold that they were, and that it conclusively appeared that they were knowingly made and were false. Our conclusion upon the evidence is that it did not so appear conclusively and that judgment notwithstanding should not have been directed.

Judgment reversed.

MARGARET A. THORPE v. E. W. COOLEY.[1]

December 12, 1917.

No. 20,571.

Bills and notes — waiver of fraud.

1. Where notes are procured by fraud, the giving of renewal notes after discovery of the fraud is a waiver of the fraud.

Pleading — relief.

2. An issue not pleaded nor voluntarily litigated on the trial cannot be made the basis for relief.

Fraud — statement of opinion not actionable.

3. Defendant was a stockholder in a corporation, the success of which consisted in making sales of water from a spring which the corporation owned. The matter of financing the corporation had proved difficult and at a corporate meeting defendant made a motion for an issue of bonds. The motion was carried and the bonds issued. Statement by a representative of the corporation to defendant, to induce him to exchange stock for bonds and to renew notes given for the stock, that the bonds were good as gold, and that he could resell them, *held* a mere statement of opinion and not such misrepresentation of fact as to constitute actionable fraud.

Same — relationship of parties — omission to disclose fact.

4. There is no evidence of such relation between the parties that fraud can be predicated on nondisclosure of facts.

Action transferred to the district court for Hennepin county to recover $2,000 upon 4 promissory notes. The case was tried before Childress, J., who at the close of the testimony denied plaintiff's motion for

[1]Reported in 165 N. W. 265.

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a directed verdict for the amount demanded, and a jury which returned a verdict in favor of defendant. From an order denying her motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Reversed.

Allen & Fletcher and *John C. Benson,* for appellant.

Leach & Leach, for respondent.

HALLAM, J.

Action on four promissory notes of $500 each, made by defendant to himself and indorsed to plaintiff. Defendant claimed the notes were procured by fraud. Plaintiff denied fraud and alleged she was a bona fide purchaser without notice. Defendant denied this. The jury found for defendant.

On June 8, 1911, the Hiawatha Water Company owned about 30 acres of land near Janesville, Wisconsin, on which was a spring. Some buildings had been erected thereon. The property was not of great value save as the spring was valuable. The company was formed for the purpose of bottling and selling water from this spring. To do this it was thought the expenditure of a large sum for advertising and promotion was required. The corporation was capitalized for $1,250,000 and the stock put on sale. Plaintiff was a doctor at Blooming Prairie, Minnesota. One Campbell, an agent selling the stock of the company, asked defendant to buy. On June 8, 1911, defendant agreed to invest $2,500 in stock and gave therefor five notes of $500 each due in six months. Those in charge of the corporation conceived the notion, popular in some quarters, that real wealth could be amassed by watering the stock and selling six dollars of stock for one dollar in money. Defendant was not averse to this method of finance and it was agreed that he should receive stock of the par value of six times his investment. Defendant paid one note and had the others renewed from time to time until March 26, 1913. At that time Thomas Peebles, who was connected with the company in some way, made demand for payment of the notes. At Peebles' suggestion defendant went to Minneapolis to see him. While there, defendant gave the notes in suit in renewal of his former notes and at the same time exchanged his right to receive stock for a right

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to receive, at par, bonds which the company had issued secured by a trust deed of its property.

The defense charges fraud committed by Campbell in procuring defendant to buy the stock and give his notes on June 8, 1911, and fraud by Peebles in procuring the renewal notes on March 26, 1913. We may assume that plaintiff was chargeable with notice of every fact in this whole transaction. The difficulty we have is in finding the existence of fraud that will avoid these renewal notes.

1. There is evidence that some misrepresentation was made to induce defendant to make the original purchase of stock and to give the original notes. The fact is, however, after he made the original purchase of stock defendant went to Janesville and investigated fully and also participated in corporate meetings. After returning from Janesville he wrote that he would soon pay his notes, and as above stated, did pay one and secured extension of the others.

It is clear that at the time defendant gave the new notes in 1913 he had full knowledge of the truth or falsity of all representations which he claims in his answer were made to him when he bought his stock and gave the first notes in 1911. All these he waived by giving the new notes. 7 Cyc. 881; 8 C. J. 445; 1 Daniel, Neg. Inst. (6th ed.) 302; Long v. Johnson, 15 Ind. App. 498, 44 N. E. 552; Brown v. First Nat. Bank, 115 Ind. 572, 18 N. E. 56; Sawyer v. Wiswell, 9 Allen, 39; Keyes v. Mann, 63 Iowa, 560, 19 N. W. 666; Calvin v. Sterritt, 41 Kan. 215, 21 Pac. 103.

Defendant claims on this appeal that there was one misrepresentation, the falsity of which he had not discovered when he gave the renewal notes, namely, there was a statement in a prospectus handed to him by Campbell that the title to all assets of the company was "free and clear." It appears there was some incumbrance upon the land. No such misrepresentation was alleged in the answer. Defendant in his amended answer alleged the acts of fraud, upon which he relied, in much detail. He did not mention this. The existence of a purchase money mortgage on the land came out in the course of a deposition taken a year and a half before the trial. Yet he never asked leave to amend to set up this statement in the prospectus as a fraud. Nor was this

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issue voluntarily litigated on the trial. Defendant in his defense in chief made no pretense of proof of facts necessary to relief on the ground of this representation. There was no suggestion that he had been deceived in this particular. Not until his surrebuttal was he asked anything about these mortgages and then only as pertaining to another point in the case. Clearly on this record defendant's notes cannot be avoided on this ground.

3. The other alleged fraud is that at the time defendant gave the renewal notes sued on and exchanged his stock for bonds, Peebles stated to him that the bonds were "good as gold" and that he would sell them and relieve defendant of his responsibility before the notes were due. Defendant claims these representations untrue. There is no claim that the bonds were worth less than the stock. Clearly they must have been worth more. Defendant knew of the bond issue before this. He had been present at a stockholders' meeting at which the stockholders "went over the matter very thoroughly." The tenor of the discussion at the meeting was that the selling of stock had been a failure and that the only way to complete the financing of the company was to issue and sell bonds. Defendant himself made the motion that the issue of bonds be made. There was no relation of confidence between these parties. Both were experienced men. Neither had means of information not open to the other. The facts which gave value to the bonds were known to both or were open to both. The fact is, both these parties were embarked in an enterprise known by them to be speculative. It was a patent fact that the value of stock and bonds of the company depended on their financing the enterprise and making successful sales of spring water. Under all the circumstances, the purported statement of Peebles that the bonds were "good as gold," and that he could sell them before defendant's notes fell due must be taken as a mere opinion as to value and not as a representation of fact. Such statements do not constitute actionable fraud. Cochrane v. Halsey, 25 Minn. 52, 64; Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244; Kimber v. Young, 137 Fed. 744, 70 C. C. A. 178. The case is not within the decision of Adan

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v. Steinbrecher, 116 Minn. 174, 133 N. W. 477 or Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

4. Some claim is made that Peebles should have disclosed the existence of certain mortgages that were on the land when the renewal notes were given. We think that there is no evidence of any such confidential relation between these parties that fraud can be predicated on nondisclosure of facts.

We think the court should have directed a verdict for the plaintiff. So ordered.

Order reversed.

JOSEPH LEBENS v. PETER WOLF.[1]

December 7, 1917.

No. 20,580.

Bailment — breach of bailee's duty — burden of proof.

1. In this action to recover damages for injury to a stallion while in the care and custody of defendant as bailee, the burden of proof is upon plaintiff, the bailor, to establish that the injury resulted from defendant's negligence or breach of duty to exercise the due care required under the contract of bailment. This is so whether the bailment be gratuitous or for the mutual benefit of the parties.

Same — evidence — dismissal of action error.

2. When plaintiff proved that defendant received the animal in a good condition and returned the same with an injury which ordinarily does not happen without negligence of the keeper a prima facie case was made out, and it was error to then dismiss the action.

Action in the district court for Nobles county to recover $878.25 for injuries to a stallion. The case was tried before Nelson, J., who when plaintiff rested granted defendant's motion to dismiss the action. From an order denying plaintiff's motion for a new trial, he appealed. Reversed.

J. A. Cashel, for appellant.

E. H. Canfield, for respondent.

[1]Reported in 165 N. W. 276.

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HOLT, J.

The complaint alleges the loan of a stallion, in good condition, to defendant, upon the agreement that he should be used solely for farm work; that the defendant should feed and care for him and take extraordinary precaution to prevent his being injured, disabled or overworked; and that defendant neglected to care for the animal so that he "became kicked" and permanently injured, in which condition he was returned to plaintiff, the owner, causing a damage in the sum of $878.25. When plaintiff rested, the action was dismissed on defendant's motion. The appeal is from the order denying a new trial.

Since the horse was returned to the bailor, the cause of action is not to be considered as one in conversion imposing the burden upon the bailee of proving that the loss was not due to want of care, under the rule in Davis v. Tribune Job Printing Co. 70 Minn. 95, 72 N. W. 808, but as one based upon negligence or failure of the bailee to give the subject of the bailment proper care while in his custody. Shropshire v. Sidebottom, 30 Mont. 416, 76 Pac. 941. The burden of proof is, therefore, upon plaintiff to show defendant's negligence or breach of duty to use due care as the cause of the injury. "The final burden is on the bailor to prove negligence, not on the bailee to prove due care." Sanford v. Kimball, 106 Me. 355, 357, 76 Atl. 890, 138 Am. St. 345. It matters not whether the bailment was gratuitous or for the mutual benefit of both parties, for the character of the bailment would only bear upon the care to be exercised in respect to the property bailed. Pregent v. Mills, 51 Wash. 187, 98 Pac. 328. Some decisions, involving damages under bailments, speak of the burden of proof as shifting to the bailee upon the bailor proving that the property was in good condition when delivered and in a damaged state when returned. But, accurately speaking, the burden of proof never shifts in the trial of a lawsuit. The burden of evidence may shift. When the testimony is all in, the preponderance thereof must be in favor of that litigant who, under the pleadings and the nature of the cause of action or defense, has the burden of proof, otherwise the decision will go to the other party. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306; Rustad v. Great Northern Ry. Co. 122 Minn. 453, 142 N. W. 727; J. D. Marshall Livery Co. v.

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McKelvy, 55 Mo. App. 240; Willett v. Rich, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684.

But, notwithstanding that the burden of proof in this case was upon plaintiff to prove negligence of defendant as the cause of the stallion's injury, we are of opinion that a prima facie case was made; hence it was error to dismiss the action. True it is that the authorities are not in harmony as to what proof will make a prima facie case in the bailment of animals, some holding that proof of good condition when delivered to the bailee and of injured when returned is not sufficient. Malaney & Blakely v. Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. 135. Others again declare such proof adequate, Miller v. Miloslowsky, 153 Iowa, 135, 133 N. W. 357; Jackson v. McDonald, 70 N. J. Law, 594, 57 Atl. 126; Hislop v. Ordner, 28 Tex. Civ. App. 540, 67 S. W. 337; Rutherford v. Krause (N. Y.) 55 App. Div. 210, 66 N. Y. Supp. 781. But it may be a harsh rule to permit an inference of negligence or want of care from the mere fact that a bailee returns an animal in a diseased or injured condition, because, in spite of due care or even the best of care, animals are subject to sickness and accidental injury in moving about. They are different in this respect from other bailable property. Therefore this rule, announced by several courts, appears more fair than either of the two mentioned, to wit: The bailor makes a prima facie case when he shows that the animal when left in the keeping of the bailee was in good condition and was returned suffering from an injury that does not ordinarily occur without negligence on the part of its keeper. Hildebrand v. Carroll, 106 Wis. 324, 82 N. W. 145, 80 Am. St. 29; Powers v. Jughardt, 101 App. Div. 53, 91 N. Y. Supp. 556; Collins v. Bennett, 46 N. Y. 490; Nutt v. Davison, 54 Colo. 586, 131 Pac. 390, 44 L. R. A. (N. S.) 1170; and cases cited under headings IX and X in the note to Stone v. Case, 43 L. R. A. (N. S.) 1168.

Without discussing or setting out the testimony it is enough, in view of our conclusion that a new trial must be had, to say that plaintiff's evidence tended to prove that defendant returned the stallion with an injury which, on account of its nature and location, could not well have been caused by disease or by accidental hurt while the animal was unattended in his stall, so that the jury, in the absence of any explanation from the one in whose care defendant had placed him when the

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injury first appeared, might reasonably infer that improper use or care was the cause thereof. This, under the rule last stated, makes a prima facie case which defendant must meet with proof in explanation or avoidance of the inference of improper care which, otherwise, the jury might legitimately draw from the facts proven.

There should be a new trial.

Order reversed.

ALBERT F. ENGEL v. CITY OF MINNEAPOLIS.[1]

December 7, 1917.

No. 20,587.

Municipal corporation — notice of defect in street.

Under the charter of Minneapolis, the mayor has control and supervision of the police department and is empowered to make rules for the government of the department. Among such rules, in force 30 years, is one requiring policemen to note all defects in streets from which accidents may occur and report the same to the officer commanding his precinct and requiring such officer to make a record thereof. For this period such defects have been reported by the police department to the officer of the city charged with the duty of making repairs, and the police have been furnished with lights to guard defective places at night until repair could be made. *Held*, that notice to the officer in charge of a police precinct of a defect in a street is actual notice to the city.

Action in the district court for Hennepin county to recover $40,000 for injuries received in riding over an obstruction in one of defendant's streets. The answer alleged contributory negligence on the part of plaintiff. The case was tried before Leary, J., and a jury which returned a verdict in favor of defendant. From an order denying plaintiff's motion for a new trial, he appealed. Reversed.

Brady, Robertson & Bonner, for appellant.

Charles D. Gould and *W. G. Compton,* for respondent.

[1]Reported in 165 N. W. 278.

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HALLAM, J.

About 9:30 p. m. on July 1, 1916, plaintiff was riding in a grocery wagon along Broadway in Minneapolis. He was sitting on the bottom of the wagon box. Broadway is paved with concrete. At one point in the street the concrete had shortly before become raised or "buckled up," making an obstruction of the height of 12 or 14 inches. As the wagon struck this obstruction plaintiff was thrown out and injured. The defect in the street was a serious one. It had not existed long and had probably been caused by expansion due to the heat. The defect was, however, reported to the police officer in charge of the East Side police station as early as 4 o'clock on that afternoon. The court instructed the jury that this was not actual notice to the city. Under this instruction the jury found for defendant. Plaintiff appeals. The correctness of this instruction is the question on this appeal.

In our opinion the instruction was erroneous. The rule is reasonably well settled that notice of a defect in a street to an officer or agent of the city is notice to the city if such officer is charged with the duty of repairing such defect or reporting it to another officer or department who does make repairs. City of Macon v. Morris, 10 Ga. App. 298, 73 S. E. 539; Cummings v. City of Hartford, 70 Conn. 115, 38 Atl. 916; City of Columbus v. Ogletree, 102 Ga. 293, 29 S. E. 749; City of Louisville v. Lenehan, 149 Ky. 537, 149 S. W. 932, Ann. Cas. 1914B, 164; City of San Antonio v. Talerico, 98 Tex. 151, 81 S. W. 518; City of Cleveland v. Payne, 72 Oh. St. 347, 74 N. E. 177, 70 L. R. A. 841.

For more than 30 years, with the exception of an interval from 1887 to 1891, when the power was vested in a police commission by chapter 9, p. 422, Sp. Laws of 1887, the charter of Minneapolis has vested the mayor with "control and supervision of the police of the city" and with power to "make all needful rules and regulations for the efficiency and discipline and promulgate and enforce general and special orders for the government of the same." Sp. Laws 1881, p. 454, c. 76, subc. 6, § 1; Sp. Laws 1891, p. 768, c. 135 [c. 6, § 1].

Since 1887 there has existed a set of rules originally promulgated by the police commission and ever since issued by the mayor. These rules with slight change from time to time have contained these provisions:

Rule 12 provides that every patrolman while on duty "shall note all

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street and sidewalk obstructions; all defects therein from which accidents may occur, removing them when practicable * * * all nuisances and all other matters affecting the safety * * * of the public * * *; and shall make report thereof without delay, in writing, to the officer commanding his precinct."

Rule 8 provides that the captains of the various stations "shall keep for reference a daily record of * * * dangerous places and accidents * * * and all other matter appertaining to the business of the department in his precinct."

The evidence is undisputed that a copy of these rules has, during all the period mentioned, been given to every policeman, and that the rules quoted have been observed as rules of the department.

It has further been the custom of the police department during all these years to report any defect in a street or sidewalk to the officer of the city charged with the duty of making proper repairs, and the different stations have been furnished with red lights with which to guard dangerous places at night until repair could be made.

If the mayor was authorized to make these rules, it is clear that they constitute a police officer a proper officer to receive notice on behalf of the city. But it is contended that the mayor had no such authority. This contention is based largely on the fact that the city charter gives to the city council the care, supervision and control of all highways and streets within the city (city charter, c. 8, § 1), and that the city council has never vested the mayor with any authority concerning streets, and has never required of the police force the discharge of any duty in connection therewith. There is some authority for the proposition that such duties can be imposed upon the police only by ordinance of the city council. City of Cleveland v. Payne, 72 Oh. St. 347, 74 N. E. 177, 70 L. R. A. 841.

We cannot follow this rule. This court has held that notice to the mayor of a defect in a street is notice to the city, because of the general powers and duties of the mayor as chief magistrate of the city. Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763. This may not be very important in this case except as it indicates that notice may be good though not given to one charged by the council with any duty respecting streets. The city policeman was not known to the early com-

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mon law. He is a creature of statute. His duties are in the main defined by statute or ordinance. The duties that he actually performs have been enlarged somewhat by custom and also by rules and regulations of his department which are not in any sense statutes. As modern cities are constituted and managed, it is important that there be some quick and ready means of discovering defects in streets and some one in authority to whom such defects may be expeditiously reported. This seems to be a very appropriate function to impose on the police department, and we are of the opinion that the mayor as chief magistrate of the city, having "control and supervision of its police force" may very properly be regarded as vested with power to impose this duty upon the police by rules and regulations looking to that end. In fact, where, as in this case, such rules have been in force and have been notoriously acted upon for 30 years, they must be deemed to have the sanction and approval of every branch of the city government.

We hold that notice of this defect to the police officer in charge of the East Side station was actual notice to the city. The authorities on the subject are meager, but we think the weight of authority sustains this position. City of Joliet v. Looney, 159 Ill. 471, 42 N. E. 854; Lundon v. City of Chicago, 83 Ill. App. 208; City of Woodward v. Bowder, 46 Okl. 505, 149 Pac. 138; Rehberg v. City of New York, 91 N. Y. 137, 43 Am. Rep. 657; Willis v. City of St. Joseph, 184 Mo. App. 428, 171 S. W. 27.

Whether the city was negligent in not guarding or earlier repairing the defect is not here determined. Much of the evidence bearing upon that question was excluded.

Order reversed.

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FRED ZIMMERMAN v. BANKERS CASUALTY COMPANY.[1]

December 7, 1917.

No. 20,588.

Insurance — errors in application by insurer's agent.

1. Where the agent of an insurance company, authorized to procure applications and forward them to the company, makes out an application incorrectly, notwithstanding that all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer, and not to the insured, and such statement will not have the effect of avoiding the policy.

Same — notice to insurer — admission of counsel.

2. The claim that the insured did not comply with the provisions of the policy, in regard to notifying the company of his condition, is sufficiently disposed of by the admission of counsel upon the trial.

Action in the district court for Hennepin county to recover $760 upon defendant's policy of insurance. The defense was a failure by plaintiff to give the required notice of his illness and a material misrepresentation by plaintiff in the application. The case was tried before Leary, J., who denied defendant's motions for a directed verdict, and a jury which returned a verdict for $679.80. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Lancaster, Simpson & Purdy and *James E. Dorsey,* for appellant.

John R. Coan, for respondent.

QUINN, J.

Action to recover upon an accident and health insurance policy issued by the defendant to plaintiff, insuring him against the effects of bodily injury sustained and disability resulting from illness contracted during the life of such policy. Plaintiff had a verdict for $679.80, and from an order denying its motion for judgment notwithstanding the verdict or a new trial defendant appealed.

[1]Reported in 165 N. W. 271.

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The policy was issued on November 16, 1915, based upon an application signed by the plaintiff on November 10, 1915. The application contained numerous questions designed to furnish the company with information relative to the applicant's condition of health, occupation and habits of life, as a guide in determining whether a policy should issue to him. The questions contained therein were propounded to the plaintiff by the agent of the defendant, and the answers written in by her. It is contended that the answers given to questions numbers 9 and 10 were not true. These questions and the answers thereto appear in the application as follows:

"9. Have you ever had * * * hernia * * * ?
State fully. No.

"10. Have you had medical or surgical treatment during the past five years? State full particulars and give name and address of attending physician. Rupture 4 yrs. ago. Dr. Corbett, Mpls., Minn. Successful operation performed."

The plaintiff had sustained a hernia caused by lifting, and was operated on by Dr. Corbett in 1911. Thereafter the hernia reappeared, due to a fall, and he wore a truss for a considerable time. In the spring of 1914, he was operated on for the same trouble by Dr. Dunsmoor, and was confined to the hospital for some weeks. In January, 1916, he slipped and fell while shoveling snow, and was carried home. The family physician diagnosed his trouble as tonsilitis, which developed into quinsy, accompanied by rheumatic pains which finally became sciatic neuritis. He was confined to his home until February 19, when the hernia trouble again appeared and he was taken to a hospital and operated on. He remained in the hospital until May 15, when he was removed to his home. During his illness several written reports of his condition were furnished the defendant company, and every 4 or 5 days it was otherwise informed of his condition.

Plaintiff's disability arising out of his fall while shoveling snow commenced about 2 months after the policy was issued and lasted for 6 months, which was the maximum period under the policy for which the company was liable. The company refused to pay his claim, because of his alleged failure to have inserted in the application mention of the operation performed on him by Dr. Dunsmoor, and because of his fail-

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ure to make the required report of his condition during his illness. Defendant insists that the failure to mention the Dunsmoor operation in answer to question No. 10 in the application was a concealment of a material fact, made with intent to deceive and defraud, and affected the risk of loss so as to defeat the policy.

Section 3300, G. S. 1913, reads:

"No oral or written misrepresentation made by the assured, or in his behalf, in the negotiation of insurance, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless made with intent to deceive and defraud, or unless the matter misrepresented increases the risk of loss."

And section 3527, G. S. 1913, is as follows:

"The falsity of any statement in the application for any policy covered by this act shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer."

At the trial plaintiff testified in substance that at the time he gave the application he fully stated to the agent of the defendant all about the operations he had undergone on account of hernia, including the one by Dr. Dunsmoor. He also testified that he had handed the agent an old policy which he had that contained mention of the Dunsmoor operation, and that she used it in making out the new application; that before signing the application he looked it over and thought she had written in all of his answers and that it contained mention of the Dunsmoor operation. The agent who took the application was also examined as a witness. She testified that she did not know that a rupture and a hernia were alike; that in answer to her questions the plaintiff told her that there was nothing the matter with him except ruptures. It is not questioned but that the agent had authority to solicit, take and forward to the defendant company applications for insurance, including the one here in question.

If, at the time of giving the application in question, the plaintiff made to the agent a full, fair and truthful statement of facts in connection with his having had a hernia and of the several operations therefor which he had undergone, and notwithstanding such statements the agent incor-

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rectly filled out the application in these respects, and the plaintiff, at the time of signing and delivering such application, looked the same over and was of the honest opinion that the application had been properly filled out and contained the answers as he had given them, then the error would be chargeable to the insurer and not to the insured, and the same would not avoid the policy. Nor is this rule affected by a stipulation in the policy subsequently issued, that the acts of the agent in making out the application shall be deemed the acts of the insured. Kausal v. Minnesota F. M. Ins. Assn. 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; 2 Dunnell, Minn. Dig. § 4717, and cases there cited. But if the plaintiff knew that untruthful statements were contained in the application, the fact would render the application invalid and avoid the policy, and this would be true though the company's agent wrote the false statements into the application. Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330.

It is insisted that the omission of mention of the Dunsmoor operation in answer to question number 10 increased the risk of loss and rendered the policy invalid. The solution of this contention is that if the person who filled out the blank application incorrectly, was an authorized agent of the defendant company, and the plaintiff was innocent of the error, then the misstatement was that of the defendant, and not that of the plaintiff. Kausal v. Minn. F. M. Ins. Assn. supra; Whitney v. National M. A. Assn. 57 Minn. 472, 59 N. W. 943.

In its instructions the trial court fully and fairly submitted to the jury all issues of fact raised upon the trial, including the propositions whether the plaintiff, in making his application, suppressed any facts or made any false representations in the several particulars claimed here by the defendant with intent to deceive, and, whether he made any false statement that materially affected the acceptance of the risk or the hazard assumed by the insurer, and that, if he did, then either one of such statements would free the defendant company from liability. The jury, by its verdict, determined each of these propositions adversely to the contention of defendant, and we think the evidence sufficient to sustain the findings.

The claim that the insured did not comply with the provisions of the policy, in regard to notifying the company in writing from time to time,

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of his condition during his illness, is sufficiently disposed of by the admission of counsel upon the trial.

Affirmed.

J. EMERSON GREENFIELD v. MINNESOTA MINING & DEVELOPMENT COMPANY.[1]

December 7, 1917.

No. 20,591.

Corporation — liability of stockholders — collateral attack on judgment.

1. In a sequestration proceeding having as one object the enforcement of stock liability the stockholders may by answer assail for fraud or collusion the judgment for the plaintiff against the defendant upon which the proceeding rests.

Same — fraud and collusion not well pleaded.

2. The answer of a stockholder in this proceeding is *held* not to allege fraud and collusion sufficiently.

Action in the district court for St. Louis county to sequestrate the property of defendant corporation and enforce the liability of stockholders. From an order, Dancer, J., sustaining plaintiff's demurrer to the amended answer, Christ Sanders appealed. Affirmed.

Courtney & Courtney, for appellant.

John Brennan, for respondent.

DIBELL, C.

This is an action to enforce the stock liability of the stockholders of the defendant corporation. The defendant Sanders answered. The plaintiff demurred to a portion of the answer. From the order sustaining the demurrer the defendant Sanders appeals.

1. The action is brought under G. S. 1913, § 6634, et seq., and rests upon a judgment for the plaintiff against the defendant corporation upon which an execution was returned unsatisfied. The answer is in-

[1]Reported in 165 N. W. 274.

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tended to charge as an affirmative defense that the judgment was procured by fraud and collusion between the plaintiff and the corporation. One point of the demurrer is that the judgment is conclusive against the stockholders and cannot be assailed, even for fraud, by answer in this action, but only by an independent action brought for the purpose or by motion in the action in which it was rendered.

In a proceeding such as this the stockholders are concluded on the question of corporate indebtedness by the judgment against the corporation in the absence of fraud vitiating it. Oswald v. Minneapolis Times Co. 65 Minn. 249, 68 N. W. 15; Holland v. Duluth Iron Min. & Dev. Co. 65 Minn. 324, 68 N. W. 50, 60 Am. St. 480; Hanson v. Davison, 73 Minn. 454, 76 N. W. 254; Town of Hinckley v. Kettle River R. Co. 80 Minn. 32, 82 N. W. 1088; Finch, Van Slyck & McConville v. Le Sueur County Co-op. Co. 134 Minn. 376, 159 N. W. 826. In the view of the law the stockholders are represented by the corporation and the judgment is in effect against them in their corporate capacity. If the judgment was procured by fraud they are not concluded. This is indeed conceded. The question is, may the judgment be assailed by answer in the sequestration proceeding for the fraud which vitiates it?

In Oswald v. Minneapolis Times Co. 65 Minn. 249, 68 N. W. 15, the court said that the judgment which supported the action was "conclusive against the stockholders until reversed for error or impeached for fraud by a direct proceeding. The judgment cannot be impeached collaterally by stockholders, any more than by the corporation itself." This language lends itself to the suggestion that in the sequestration proceeding the stockholder cannot show fraud inhering in the judgment; but in that case, as the court says, no facts constituting fraud were alleged or proved. In Town of Hinckley v. Kettle River R. Co. 80 Minn. 32, 82 N. W. 1088, fraud and collusion in the judgment were alleged by the stockholders. The trial court found against the charge and its finding was sustained by this court. The plaintiff there as here urged that the stockholders could not in the sequestration proceeding assail the judgment for fraud. The particular point was not mentioned in the opinion. It is clear that neither of the cases is decisive of the question.

An examination of the cases outside of this state shows that in like or resembling proceedings the cases almost universally hold either directly,

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or by way of legitimate inference, that an issue of fraud may be raised in the manner here sought. It is not of moment whether it be said that such an attack is a direct attack or that because of the fraud a permissible collateral attack. We cite as bearing directly or incidentally upon the question the following: Bissit v. Kentucky River Nav. Co. (C. C.) 15 Fed. 353; Warrington v. Ball, 90 Fed. 464, 33 C. C. A. 609; Ball v. Warrington, 108 Fed. 472, 47 C. C. A. 447; American Nat. Bank v. Supplee, 115 Fed. 657, 52 C. C. A. 293; Saylor v. Commonwealth Banking Co. 38 Ore. 204, 62 Pac. 652; Robinson v. Phegley, 84 Ore. 124, 163 Pac. 1166; Choat v. Boyd, 59 Kan. 682, 54 Pac. 1042; Wilson v. Kiesel, 9 Utah, 397, 35 Pac. 488; Whitman v. Cox, 26 Me. 335; Nichols v. Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. 514; McBryan v. Universal Ele. Co. 130 Mich. 111, 89 N. W. 683, 97 Am. St. 453; Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. ed. 564; Ward v. Joslin, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. ed. 1093; 4 Thompson, Corp. (2d ed.) § 4982; 2 Black, Judgments (2d ed.) § 583; 1 Bolles, Banking, 154; 10 Cyc. 733, et seq.; 12 Cent. Dig Corp. §§ 1024-1030; 5 Dec. Dig. Corp. § 253; 11 Dec. Dig. Judg. § 701.

Each rule has its advantages and disadvantages. We adopt the one in accord with authority and hold that the stockholders may by answer in the sequestration proceeding assail for fraud or collusion the plaintiff's judgment upon which the proceeding rests.

2. The answer alleges in very general terms that the plaintiff, who was the vice president and the principal stockholder of the defendant corporation, advanced it large sums of money, taking its notes at usurious rates, and requiring it to turn over large amounts of stock as a consideration for the making of the loan. The facts constituting the usury are not more specifically stated. There is a further general allegation that the judgment upon such loans was suffered to be entered by default and through the fraud or collusion of the directors and officers of the corporation with the plaintiff. No specific facts are stated. The question is not wholly free of doubt, for the plaintiff is an officer of the corporation and the details of his dealings with it are not presumptively within the knowledge of the defendant, but we reach the conclusion that the answer is insufficient. Of course it is settled that mere general al-

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legations of fraud are insufficient. We are not now concerned with the general question of the effect of usury between the plaintiff and the corporation or of the effect of the entry of a judgment upon usurious contracts. No such question is determined on this appeal.

The fifth paragraph of the answer alleges that the affairs of the corporation were negligently and fraudulently conducted by the plaintiff and its officers and its assets depleted. It is a concession of the defendant's brief that these allegations do not constitute a separate defense and are of importance only in connection with the charges of fraud and collusion affecting the judgment. We accordingly construe the answer as presenting only one affirmative defense and what is alleged in paragraph five requires no further consideration.

Order affirmed.

COMMERCIAL CLUB OF CITY OF DULUTH v. NORTHERN PACIFIC RAILWAY COMPANY.[1]

December 7, 1917.

No. 20,595.

Railway — Cashman Act inapplicable to switching rates between city and suburb.

The Cashman Act (c. 90, Laws 1913), does not apply to switching operations nor to movements from place to place within a city or district which constitutes a single shipping point. Traffic between Duluth station and the suburb of Fond du Lac in Duluth is *held* to be between places within a single shipping point and to this traffic the act does not apply.

From an order of the Railroad and Warehouse Commission requiring the Northern Pacific Railway Company to restore certain switching charges at Duluth, Minnesota, which had been in effect previous to January 1, 1914, the railway company appealed to the district court for St Louis county. The appeal was heard before Cant, J., who made find-

[1]Reported in 165 N. W. 270.

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ings and affirmed the order of the commission. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Washburn, Bailey & Mitchell, Charles W. Bunn and Charles Donnelly, for appellant.

Baldwin, Baldwin & Holmes and *Lathers & Hoag,* for respondent.

HALLAM, J.

Duluth is a terminal point on defendant's lines. For some years prior to 1914 the whole of the city of Duluth was treated by defendant and the public as a single shipping point or switching district. All transportation between points within the city was governed by a so-called switching tariff, published by defendant and approved by the Railroad and Warehouse Commission. The city was divided into three zones or subdistricts. District No. 3 included the suburbs of New Duluth, Spirit Lake and Fond du Lac, located on a spur line running out of Duluth station. On this spur there are 10 stopping places. Spirit Lake is 9 miles from Duluth, New Duluth 12, and Fond du Lac at the end of the spur is 14. The territory is very considerably occupied as far as New Duluth. Between there and Fond du Lac there is some unsettled territory. At New Duluth and Fond du Lac there are station agents, at Spirit Lake none. Traffic between Duluth and these stations is handled by road engines and billed as line hauls are billed, but sometimes freight moved between switching points is so billed.

The Cashman Act (Chapter 90, p. 76, Laws 1913, G. S. 1913, § 4353), established the distance tariff system within the state, and empowered the Railroad and Warehouse Commission to make a reasonable maximum rate of charges for transportation of freight. On December 10, 1913, the commission issued an order prescribing reasonable maximum distance rates. Defendant thereupon published a tariff and applied this tariff and rate to points between district No. 3 and the rest of Duluth and canceled the switching rates theretofore applicable to this traffic. The distance tariff rate is in some instances higher than the old switching rates. The Commercial Club of Duluth complained to the commission and the commission, after a hearing, ordered the restoration of the old rates. On appeal to the district court, the order was affirmed and the railroad company appealed to this court.

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We held in the recent case of Washed Sand & Gravel Co. v. Great Northern Ry. Co. 130 Minn. 272, 153 N. W. 610, that the distance tariff requirements of the Cashman Act do not apply to rates for switching operations nor to movements from place to place within a city or district which constitutes a single shipping point, and that for these operations a rate may be required and charged different from those made applicable to line hauls. Under this decision the traffic excluded from the scope of the act is somewhat more than what is technically known as switching, and is not limited to drayage movements nor to movements auxiliary to a line haul. If transportation between points in district No. 3 and other points in Duluth is to be treated either as a switching operation or as the movement of freight from one place to another within a single shipping point, and not as a line haul, the distance tariff does not apply.

In the case cited we held that the limits of a shipping point are not necessarily coincident with the limits of a city. They may be more extensive. Perhaps they may be less extensive, but usually not. The important question is whether the district is a single industrial center. This is usually a question of fact. The Los Angeles Switching Case, 234 U. S. 294, 34 Sup. Ct. 814, 58 L. ed. 1319. In determining that question, the extent of the district, the industrial relation of one part to another, the nature of the traffic, are things to be considered. Whether the traffic is handled by train crews or switching crews and whether on way bills or switching orders, are matters to be considered, but the manner of handling is not decisive. The fact that the railroad and the public have acquiesced in applying a switching tariff is important when that fact appears, as it does here. All these things are to be taken into account.

The commission and the trial court found that this district was all embraced within a single shipping point. We think the finding is sustained by evidence. It follows, that the whole district was properly governed by what is known as a switching tariff, and that the provisions of the Cashman Act for a distance tariff do not apply. The increase in rates as applied to this district was unauthorized and the order of the railroad commission and of the trial court was right.

Judgment affirmed.

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J. JANKOWITZ v. B. KAPLAN AND ANOTHER.[1]

December 7, 1917.

No. 20,598.

Chattel mortgage — failure to serve notice of sale on person in possession.

1. The failure to serve a copy of the notice of sale in proceedings to foreclose a chattel mortgage upon the person in the actual possession of the mortgaged property, as required by G. S. 1913, § 6974, renders the proceedings invalid.

Same — objection open to mortgagor.

2. The objection to the failure to make such service is open to the mortgagor, though he may have sold the property prior to the date of the foreclosure proceedings.

Same — set-off.

3. The mortgagee purchased the property at the foreclosure and thereafter sold a part thereof to a third person, receiving therefor an amount in excess of the mortgage debt. It is *held* that such sale was a conversion of the property, since the foreclosure was void, and in an action to recover a balance due on the mortgage debt the mortgagor may interpose the amount so received as a set-off.

Same — proof of value unnecessary.

4. It is not necessary in such case to prove the value of the property. Powell v. Gagnon, 52 Minn. 232, distinguished.

Action in the municipal court of Minneapolis to recover $394.69 upon 10 promissory notes. The opinion states the facts. The case was tried before Charles L. Smith, J., who made findings and ordered judgment in favor of defendant Kaplan. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Robert M. Works, for appellant.

W. B. McIntyre, for respondent.

BROWN, C. J.

This action was brought in the municipal court of Minneapolis to re-

[1]Reported in 165 N. W. 275.

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cover upon 10 promissory notes, amounting in the aggregate to the sum of $400. Defendant had judgment and plaintiff appealed from an order denying a new trial.

The defense to the action was that the payment of the notes was secured by a chattel mortgage upon certain personal property, for which the notes were given by defendants as a part of the purchase price; that prior to the commencement of the action plaintiff under the authority of the mortgage and in proceedings to foreclose the same, which were defective and void, took possession of the mortgaged property, of the alleged value of $1,600, and thereafter wrongfully converted it to his own use. Plaintiff's reply to the answer was a general denial. The trial court found the facts in favor of the defense and ordered judgment accordingly.

The evidence shows without dispute that the notes were in fact secured by a chattel mortgage; that plaintiff some time in April, 1915, attempted to foreclose the mortgage, and to that end took possession of the property, and at the sale in the foreclosure proceedings became the purchaser of all of the property for the sum of $150, that being the highest and best bid offered. It further appears that subsequent to the foreclosure plaintiff sold a part of the property to a third person for the consideration of $500; and he still retains in his possession the remainder thereof.

Whether plaintiff converted the property to his own use by the sale just mentioned depends upon the question whether the foreclosure was valid or invalid. If invalid the conversion is clear. But if valid, there is an end of the case and plaintiff should prevail, for defendants in that event would be in no position to complain that the property did not bring enough to pay the mortgage debt, or to complain of the subsequent sale by plaintiff of a part of the property.

1. It appears that after defendants became the owners of the property in January, 1914, by various subsequent sales and transfers it came into the possession of one B. Rodner, who at the time of the foreclosure was in the undisputed possession of the property, using the same for the purposes for which it was adapted. The property made up the equipment of a steam laundry and Rodner was operating the laundry at the time the property was taken in the foreclosure proceedings. No notice of the

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foreclosure was served upon him, and herein is the defect which the trial court held to invalidate the foreclosure. Upon the record here presented we are clear that the trial court was right in that conclusion.

We have heretofore held that the statute authorizing the foreclosure of chattel mortgages must be strictly complied with. Powell v. Hardy, 89 Minn. 229, 94 N. W. 682. In that case the notice of foreclosure was served upon the mortgagors, as in the case at bar, but there was a failure to post the same in three public places, as required by the statutes. The foreclosure was held invalid. The rule controlling that decision was that which has uniformly been applied to proceedings in foreclosure of real estate mortgages. Casey v. McIntyre, 45 Minn. 526, 48 N. W. 402. In the case at bar the defect is the failure to serve the notice upon the person in possession of the mortgaged property, as required by G. S. 1913, § 6974. For the reasons stated in the Powell case, this defect renders the foreclosure invalid. Whitehead v. Coyle, 1 Ind. App. 450, 27 N. E. 716; Bendel v. Crystal Ice Co. 82 Cal. 199, 22 Pac. 1112.

But plaintiff contends that Rodner was not the owner of the property, but was holding possession for the real owner, one Adlin, upon whom notice was in fact served. The point is not sustained. The precise relation of Rodner to the property is not made clear by the evidence. There were no specific findings upon the question, nor did plaintiff request findings thereon. But the court did find that Rodner was in the possession of the property and engaged in running and operating the laundry when it was taken in the foreclosure proceeding. This finding clearly brings the case within the statute requiring the service of notice upon the one in possession of the mortgaged property. The evidence is far from conclusive that Rodner was holding the property for Adlin, and if plaintiff believed such to be the fact he should have requested a finding thereon. 3 Dunnell, Minn. Dig. §§ 9865-9866.

The further point that since defendants were notified of the sale they are in no position to challenge the foreclosure for the failure to notify Rodner is not sustained. The statute intends that all persons interested in the property shall be informed of the foreclosure, to the end that the rights of all may be protected. Where the mortgagor has sold the property it is important to him that the purchaser, if still the owner and in possession of the same, be notified of the intended sale, for he has an in-

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terest to protect, and may be under obligation to pay the mortgage debt for the protection of the mortgagor. And clearly the latter may insist that the failure to serve the notice is a substantial violation of the statutory requirement in this respect.

2. Plaintiff further contends, conceding the invalidity of the foreclosure, that defendants are not entitled to the relief granted, namely, the extinguishment of the balance due on the mortgage debt as represented by the notes in suit, for the reason that there was no evidence on the trial of the value of the property. Plaintiff cites in support of the point Powell v. Gagnon, 52 Minn. 232, 53 N. W. 1148, and Cushing v. Seymour, Sabin & Co. 30 Minn. 301, 15 N. W. 249. The point is not sustained. It appears from the record that plaintiff bid in the property at the sale for the sum of $150. Thereafter he sold a part of it to a third person for $500. This amounted to a wrongful conversion of the mortgaged property. And as the amount so received exceeds the total amount due on the mortgage, defendants are entitled to credit therefor. It was not necessary therefore to prove the value of the property. The case would be different if plaintiff still held the property and had sold no part thereof, or for the part sold had not received enough to satisfy the mortgage debt.

This covers all the assignments necessary to be considered. The questions decided dispose of the case on the merits and all others become immaterial. The Zipperman mortgage is not a factor in the case. It was not pleaded by plaintiff in avoidance of the defense or otherwise, and whether the foreclosure thereof in any way affected rights arising under plaintiff's mortgage, the first in time, is not involved. It was properly ignored by the court in making its findings.

Order affirmed.

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WILLIAM C. CHRISTISON v. ST. PAUL CITY RAILWAY COMPANY.[1]

December 7, 1917.

No. 20,645.

Street railway — collision with automobile — contributory negligence.

Where a passenger in an automobile on approaching a street intersection, over which street cars are operated, hears a street car coming thereon at a high or dangerous rate of speed, it is a question for the jury whether, in the exercise of ordinary care, he should have warned the driver of the automobile, and whether a failure so to warn contributed to the collision, then occurring between the automobile and street car.

Action in the district court for Ramsey county to recover $3,460 for injuries received in a collision between an automobile and a street car. The case was tried before Converse, J., and a jury which returned a verdict for defendant. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Edgerton & Dohs, for appellant.

W. D. Dwyer and *F. D. McCarthy*, for respondent.

HOLT, J.

The action is to recover damages for injuries received in a collision between defendant's street car and an automobile in which plaintiff was riding. Defendant had a verdict and plaintiff appeals from the order denying a new trial.

The evidence was such that the jury could find either way on the issue of defendant's negligence. The court also submitted the defense of plaintiff's contributory negligence. This furnishes the only basis for the appeal. There was no direct testimony offered by defendant to establish negligence on the part of plaintiff; but the answer alleged it as a de-

[1]Reported in 165 N. W. 273.

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fense, and if there was evidence on that issue, no matter by whom adduced, no error occurred in submitting the same to the jury.

Plaintiff, on the day of the accident, was invited to ride in a Ford automobile owned and driven by his brother. It was early in the afternoon of a windy and cold November day. The ground was bare and dry. Another person sat in the front seat with the driver. Plaintiff was alone in the back seat. They drove south on Lexington, a paved street running north and south in the city of St. Paul, and were approaching Rondo, a street running east and west, along which, upon double tracks, defendant operates street cars. There is a 4 per cent down grade from Dunlap to Lexington. Dunlap is the first street west of Lexington, and runs parallel thereto. Plaintiff's evidence tended to show that the automobile was moving at the rate of from 15 to 20 miles an hour when nearing the street car tracks. The top of the machine was up, and also the side curtains for the rear seat, but the front view of plaintiff was unobstructed, and there was a chance to obtain a side view through the usual isinglass placed in the side curtains. There is a cut in Rondo street as it approaches Lexington, but the driver of the automobile saw the street car coming from the west as he was within 90 feet of Rondo. Plaintiff testified that he did not see the street car but he heard it. He said: "I heard [it] coming very fast." He made no attempt to notify the driver of this fact. Whether he heard the car so coming before it was in view of those in the front seat does not appear clearly; the jury might draw the inference that he ascertained the situation in time to warn his brother and thereby avert a collision. It is common knowledge that persons in the rear seat of an automobile are in better position to hear the approach of other vehicles than those in the front seat, owing to the fact that they are farther removed from the noise of the automobile engine. Under these circumstances, it cannot be said as a matter of law that reasonable men might not conclude that an ordinarily prudent person hearing the rapid approach of the street car would have made an outcry, and that the failure to so do contributed to the collision.

Plaintiff relies upon McDonald v. Mesaba Ry. Co. 137 Minn. 275, 163 N. W. 298. But the facts are not similar. There the plaintiff had no knowledge of the approach of danger, in fact she had no reason to expect

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the coming of an electric car at that time; she was in a public conveyance, her back was toward the danger, and she had no opportunity to look out because of the frosted condition of the windows in the bus. In that case, after reviewing the authorities, it is stated that "usually the question of the passenger's personal negligence is considered one of fact for the jury."

In the argument it was asserted that plaintiff knew his brother to be a careful driver. We fail to find any testimony to that effect. The brother testified that he had driven a machine for 8 or 10 years, but his statement that he "sometimes" slowed up at street intersections hardly tends to prove that long experience will produce careful drivers.

The appellant contends that imputed negligence is a constituent element of contributory negligence and because no allusion thereto was made in the charge the jury were misled. We do not see how that can be, for the jury were told that if the driver's negligence was found to be the sole cause of the collision there could be no recovery. This excludes the idea that the driver's contributory negligence could under any circumstances be a defense in this case. The charge in respect to contributory negligence was confined strictly to the conduct of plaintiff, leaving no room for a suggestion that the jury might in that connection consider the acts or omissions of the driver. Moreover, if any specific instruction was deemed necessary to caution the jury against imputing the conduct of the driver of the automobile to plaintiff, a request therefor should have been made to the court. This was not done.

Order affirmed.

BOARD OF WATER COMMISSIONERS v. ROSELAWN CEMETERY.[1]

December 7, 1917.

No. 20,690.

Eminent domain — condemnation by city — notice of trial.

1. The charter requirement that the appeal be placed upon the calen-

[1]Reported in 165 N. W. 279.

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dar for the succeeding term of court was sufficient authority for placing it thereon without a notice of trial.

Same — assessment of damages — jury trial.

2. The owner of property taken under the power of eminent domain conferred by the charter of the city of St. Paul is not entitled as a matter of right to have his damages assessed by a jury; and upon an appeal to the district court he is not entitled to a jury trial unless the court grants it in the exercise of its discretion.

Same — powers of board of water commissioners.

3. The board of water commissioners of the city of St. Paul is a mere agency of the city, and its authority to exercise the power of eminent domain is derived from the charter of the city and must be exercised as provided in such charter.

Same — appeal from award of commissioners — power under charter.

4. The appeal from the award of the commissioners is limited to the question of damages and raises no question as to the regularity or sufficiency of the proceedings. But, if power to take the property be lacking, power to award damages is also lacking, and appellant is not debarred from raising the question that taking the property in controversy is beyond the power conferred by the charter.

Same — where property is devoted to public use.

5. The rule that property already devoted to one public use cannot be taken for another public use without express authority therefor, does not apply to property which has not actually been put to the prior use and is not shown to be actually and presently needed therefor. The property in controversy has not been actually put to a public use and is not shown to be needed therefor.

Same — ascertaining damages.

6. It does not appear from the record that the court adopted an incorrect basis of value in fixing the amount of appellant's damages.

Roselawn Cemetery appealed to the district court for Ramsey county from the report of appraisers appointed in the matter of the application of the board of water commissioners of the city of St. Paul to assess damages occasioned by taking of property for the extension of its waterworks system. The appeal was heard before Haupt, J., who made findings and sustained the award of the commissioners to the cemetery. The motion of the cemetery for a new trial was denied. From the judgment

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entered pursuant to the order for judgment, Roselawn Cemetery appealed. Affirmed.

William G. White, for appellant.

O. H. O'Neill and *John A. Burns*, for respondent.

TAYLOR, C.

This proceeding was instituted by the board of water commissioners of the city of St. Paul, under the charter of that city, to condemn certain land adjoining one of its reservoirs for use in extending its water works system. A part of this land belonged to the Roselawn Cemetery, a corporation, and the remainder to C. F. McCarron. The damages for taking the land were assessed by commissioners appointed by the district court as provided by the charter. The Roselawn Cemetery appealed from this assessment to the district court under the charter provision therefor, and, after a trial, that court rendered judgment fixing the damages at the same amount awarded by the commissioners. The Roselawn Cemetery appealed therefrom to this court.

The appeal to the district court was taken in the early part of October and was placed upon the calender of that court for the term beginning in November. Appellant moved to strike the appeal from this calendar on the ground that no notice of trial had been served, and insists that the denial of this motion was error. The ruling was correct for the city charter provides that "the appeal shall be entered on the calendar for the succeeding term of said court," [1] and this express statutory command was sufficient authority for placing it on the calendar without further action by either party.

Appellant made a motion for a jury trial and insists that the denial of this motion was error.

Where property is taken under the power of eminent domain, the owner is not entitled, as a matter of right, to have his damages assessed by a jury, unless such right is expressly conferred by statute. He did not possess that right at common law and it is not conferred by the Constitution. Ames v. Lake Superior & Mississippi R. Co. 21 Minn. 241, at pages 292, 293; City of Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581; City of St. Paul v. Nickl, 42 Minn. 262, 44 N. W. 59; Morton

[1] [Section 455.]

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Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527; 10 R. C. L. 187, § 161. Appellant concedes this, but claims to be entitled to a jury trial under the provision therefor found in chapter 41 of the General Statutes. The first section of this chapter is as follows: "Whenever the taking of private property for any public use shall be authorized by law, it may be acquired, under the right of eminent domain, in the manner prescribed by this chapter; but nothing herein shall apply to the condemnation of property by any incorporated place whose charter provides a different mode of exercising the rights of eminent domain by it possessed, or to the taking of property under the chapters relating to roads and drainage." G. S. 1913, § 5395.

Appellant contends that the board of water commissioners is not an "incorporated place," and that consequently condemnation proceedings instituted by such board are not excluded from the operation of the provisions of chapter 41 by the above section. But the city of St. Paul is an "incorporated place" whose charter prescribes the procedure to be followed in exercising the power of eminent domain conferred thereby; and the board of water commissioners is not an entity separate and independent of the city, but a mere agency or department of the city provided for and governed by the city charter; and its authority to exercise the power of eminent domain rests upon such charter and must be exercised thereunder. As condemnation proceedings brought by the city itself do not come under chapter 41, neither do those brought under the charter of the city by the subordinate agencies of the city, in the absence of a statute to that effect. The charter provides that appeals to the district court from such assessments, "shall be tried and judgment therein given and the like costs allowed as in actions brought in said court." [1] Appellant contends that this provision should be construed as adopting the procedure for the trial of appeals prescribed by chapter 41, for the reason that condemnation proceedings brought under the charter are of the same general nature as the proceedings under that chapter. If such had been the intention, it could easily have been expressed; and language which imports that such trials shall be governed by the rules which govern the trial of ordinary actions would hardly have been used. Similar language has uniformly been

[1] [Section 455.]

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construed to mean that the rules which govern the trial of ordinary actions shall apply in all respects in which a different rule is not expressly prescribed. See Minneapolis, St. P. R. & D. Ele. T. Co. v. Goodspeed, 128 Minn. 66, 150 N. W. 222; Peters v. City of Duluth, 119 Minn. 96, 137 N. W. 390, 41 L.R.A.(N.S.) 1044; Lehmicke v. St. Paul, S. & T. F. R. Co. 19 Minn. 406 (464). Under those rules, granting a jury trial rested in the discretion of the court; and in the present case the court undoubtedly could have submitted to a jury the question as to the amount of damages, but we are of opinion that the charter did not require it to do so.

By the charter, appeals from the award of the commissioners are limited to the question of damages, and appellant's appeal was limited to that question, and did not raise or attempt to raise any question as to the regularity or sufficiency of the prior proceedings, and no such question is involved herein. Rheiner v. Union Depot, St. Ry. & T. Co. 31 Minn. 289, 17 N. W. 623; 1 Dunnell, Minn. Dig. § 3110. See also Dressen v. Board of Co. Commrs. of Nicollet County, 76 Minn. 290, 79 N. W. 113; Mundwiler v. Bentson, 128 Minn. 69, 150 N. W. 209; Minneapolis, St. P. R. & D. Ele. T. Co. v. St. Martin, 108 Minn. 494, 122 N. W. 452; Minneapolis, St. P. R. & D. Ele. T. Co. v. Grimes, 128 Minn. 321, 150 N. W. 180, 906.

The appeal to this court did not bring the entire condemnation proceeding before this court for review, but only the judgment fixing the amount of appellant's damages; and no question as to whether the condemnation proceeding was brought in the proper manner, or as to whether the city had properly directed the bringing of the same, is before us. The only questions for review are those relating to appellant's damages. The only question involved, aside from that bearing upon the amount of damages, is whether the charter conferred power to take the property for the taking of which the award was made. If power to take the property be lacking, power to award damages for taking it is also lacking. County of Ramsey v. Stees, 28 Minn. 326, 9 N. W. 879; Pfaender v. Chicago & N. W. Ry. Co. 86 Minn. 218, 90 N. W. 393, 1133. And we think appellant may raise the question as to whether the charter conferred power to take the property and make the assessment and award in controversy, notwithstanding the fact that, if the charter confers

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such power, appellant is not in position to attack the regularity or sufficiency of the proceedings instituted for the purpose of exercising the power. Bomsta v. Nelson, 137 Minn. 165, 163 N. W. 135.

Appellant contends that the land in question has already been devoted to a public use, and invokes the rule that property already devoted to one public use cannot be taken for another public use, unless the power to take it for the second use has been expressly given, or is necessarily implied in the power expressly given. The rule invoked exempts from condemnation, under a mere general power to condemn, property previously appropriated to another public use which has been actually put to such prior use, but does not exempt from condemnation property which has not been actually put to the prior public use, at least unless it be shown that the property is in fact needed for the prior public use and that effective measures are being taken to apply it thereto without undue delay. 10 R. C. L. 201, § 170. Cases bearing upon this question are collated in a note at 24 L.R.A.(N.S.) 383, and from these cases the annotator draws the following conclusion: "It seems to be the universal rule that property, although previously condemned or purchased for a public use, but which never has been put to such use, or has ceased to be so used, is subject to condemnation the same as property of a private individual." That the rule is limited as above stated has frequently been recognized by this court. St. Paul Union Depot Co. v. City of St. Paul, 30 Minn. 359, 15 N. W. 684; In re St. Paul & N. Pac. Ry. Co. 34 Minn. 227, 25 N. W. 345; Minneapolis Western Ry. Co. v. M. & St. L. Ry. Co. 61 Minn. 502, 63 N. W. 1035; Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co. 76 Minn. 334, 79 N. W. 315; Independent School Dist. of Virginia v. State, 124 Minn. 271, 144 N. W. 960.

Appellant acquired 250 acres of land at the north edge of the city and subdivided it into small parcels of varying size. Only a small part of the tract has been subdivided into burial lots or actually appropriated to cemetery purposes. Several parcels, each containing 4 or more acres, have been sold as sites for country or suburban residences. How much of the remainder is held for sale, and how much is held with a view of appropriating it to cemetery purposes in the future does not appear. The land in controversy adjoins a reservoir of the city and is

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located at the east edge of the tract some distance from the land which has been actually appropriated to cemetery purposes, and is not shown to be needed for such purposes. So far as appears appellant will still have more land suitable and available for cemetery purposes than is necessary for any contemplated increase in the size of its cemetery, and more than it has any expectation of devoting to cemetery purposes. We are of opinion that appellant has failed to bring itself within the protection of the rule which it invokes, and that the land is subject to condemnation for the use of the city waterworks.

Appellant also insists that the court adopted a wrong rule for determining the amount of its damages. This contention is based upon the fact that two of the commissioners, who were witnesses for the city, in answer to questions upon cross-examination stated that they made their estimate of value without taking into account the value of the land for reservoir or cemetery purposes. In their direct examination they had given their estimate of the value of the land, "for any and all purposes for which the same could be used or was available," and after making the answers upon which appellant relies gave further testimony to the effect that in their opinion the availability of the land for cemetery or reservoir purposes did not add materially to its value. The cross-examination and redirect examination drew out something of the mental process by which these witnesses arrived at their estimates; but, whatever effect it might have upon the weight to be given to their testimony, it fails to show that the court "did not adopt the correct basis of value, viz., what the property would have sold for, as between one who wanted to buy and one who wanted to sell." State v. Brill, 58 Minn. 152, 59 N. W. 989.

We find no reversible errors in the record and the judgment is affirmed.

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STATE EX REL. MARTIN PETCOFF v. C. S. REED.[1]

July 20, 1917.

Nos. 20,515—(252).

Criminal law — habeas corpus — when convict is not entitled to discharge.

1. Where the conviction is valid and only the sentence void, a defendant is not entitled to an unconditional discharge upon a writ of habeas corpus.

Same — excessive sentence.

2. If the sentence exceeds the penalty which the court had power to impose, it is void as to the excess; but the defendant cannot be discharged on habeas corpus until he has performed the part which the court had power to impose if it be severable from the unlawful part.

Same — remanded when sentence is void.

3. If the sentence is wholly void the defendant will be remanded for a lawful sentence.

Same — when indeterminate sentence is void.

4. Where the law requires a sentence to be for a definite term, a sentence from which the length of the term cannot be ascertained is void.

Same — when sentence "according to law" is void.

5. A sentence for murder in the third degree to "imprisonment at hard labor in the state prison at Stillwater, Minnesota, according to law," when the statute required for such a crime a definite term of "not less than seven years nor more than thirty years," is void.

Upon the relation of Oscar Todorff the district court for Washington county granted its writ of habeas corpus in favor of Martin Petcoff directed to the warden of the state prison. The respondent made return and on the return day the writ was discharged, Nethaway, J. From the order of dismissal, relator appealed. Remanded with directions.

Thomas J. Newman and *Harvey O. Sargeant,* for appellant.

Lyndon A. Smith, Attorney General, and *C. Louis Weeks,* Assistant Attorney General, for respondent.

[1]Reported in 163 N. W. 984.

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TAYLOR, C.

A writ of habeas corpus was issued from the district court of Washington county to the respondent, warden of the state prison. Upon the hearing the writ was discharged. The relator appeals. Under our statute the trial in this court is a trial de novo.

On November 26, 1913, the relator was duly convicted in the district court of Ramsey county of the crime of murder in the third degree committed on July 23, 1913, and thereupon was sentenced to "imprisonment at hard labor in the State prison at Stillwater, Minnesota, according to law." This sentence was evidently imposed on the theory that the indeterminate sentence law (Laws 1911, p. 412, c. 298, G. S. 1913, § 9267), applied to murder in the third degree, and would be sufficient if the case came under that law. But that law did not then apply to murder in any of its degrees. It has been extended by chapter 319, p. 455, of the Laws of 1917, so that it now applies to murder in the third degree, but, as the amendment does not apply to crimes committed before its passage, it has no bearing upon the present case. The law governing the present case provides that murder in the third degree "shall be punished by imprisonment in the state prison for not less than seven years, nor more than thirty years" (G. S. 1913, § 8606); and further provides that, "whenever the punishment is left undetermined between certain limits, the court shall determine the same within the prescribed limits." G. S. 1913, § 8480. The law required the court, in the exercise of its judicial discretion, to fix a definite term which could not be less than 7 years nor more than 30 years. On the theory that the indeterminate sentence law applied, the court failed to do so and the sentence is clearly erroneous.

Only the validity of the sentence is challenged; the validity of the conviction is conceded. Where the conviction is valid, but the sentence imposed is void either in whole or in part, the weight of modern authority is to the effect that the prisoner cannot secure an unconditional discharge upon a writ of habeas corpus.

If the sentence imposes a greater penalty than the court had power to impose, it is void as to the excess; but, if the sentence be severable so that the lawful part may be performed without performing the unlawful part, the prisoner is not entitled to a discharge on habeas corpus

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until he has fully performed so much of the sentence as the court had power to impose. State v. Reed, 132 Minn. 295, 156 N. W. 127; In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. ed. 149; De Bara v. U. S. (C. C. A.) 99 Fed. 942, 40 C. C. A. 194; U. S. v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. ed. 631; Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. ed. 110, 21 Ann. Cas. 849; In re Taylor, 7 S. D. 382, 64 N. W. 253, 45 L.R.A. 136, 58 Am. St. 843; Ex parte Melosevich, 36 Nev. 67, 133 Pac. 57; In re Cica, 18 N. M. 452, 137 Pac. 598, 51 L. R. A. (N. S.) 373; 12 R. C. L. 1208, § 27, and cases there cited; Ex parte Ellerd, 71 Tex. Cr. 285, 158 S. W. 1145, Ann. Cas. 1916D, 361, and cases cited in note appended thereto.

If the sentence is valid in part and void in part and the two are not severable, or if it is wholly void because not such as the court was authorized to impose, the prisoner will be remanded for the imposition of a lawful sentence. State v. Miesen, 98 Minn. 19, 106 N. W. 1134, 108 N. W. 513; State v. Langum, 125 Minn. 304, 146 N. W. 1102; In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. ed. 149; People v. Kelly, 97 N. Y. 212; In re Collins, 51 Mont. 215, 152 Pac. 40; In re Howard, 72 Kan. 273, 83 Pac. 1032; Re Harris, 68 Vt. 243, 35 Atl. 55; State v. District Court, 35 Mont. 30, 89 Pac. 63; Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. 266.

Where the law requires a definite term, a sentence to imprisonment to be valid must be so definite and certain that both the prisoner and the officer charged with his custody may ascertain therefrom the term for which he is committed. In re Howard, 72 Kan. 273; Picket v. State, 22 Oh. St. 405; People v. Pirfenbrink, 96 Ill. 68. If a sentence apparently indefinite can be made definite by reading it in connection with the statute under which it is imposed, it will be sustained. Elsner v. Shrigley, 80 Iowa, 30, 45 N. W. 393; In re Hamilton, 188 Mich. 499, 154 N. W. 567.

The suggestion is made that as the law fixes the minimum term at seven years, the sentence in question is valid to that extent, and should be construed as imposing a term of seven years.

The rulings are to the effect that an indeterminate sentence, imposed under a law authorizing such sentences, is a sentence for the maximum term prescribed for the offense committed, coupled with a provision

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which permits but does not require an earlier release; that, as an earlier release cannot be demanded as of right, the sentence necessarily operates as a sentence for the maximum term. State v. Page, 60 Kan. 664, 57 Pac. 514; Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843; Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. 266; People v. State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L.R.A. 139; see also State v. Wolfer, 119 Minn. 368, 138 N. W. 315, 42 L.R.A. (N.S.) 978, Ann. Cas. 1914A, 1248.

The argument that only seven years was intended is no more forceful than an argument that 30 years was intended. Neither term was in the mind of the court as a definite period of imprisonment. The court intended to impose an indeterminate sentence, under which the defendant might be released by the board of parole at any time after seven years, but would be held for 30 years unless so released. The sentence is not erroneous because the term contemplated is too short or too long, but because it is indefinite. The law required the sentence to be for a definite term, and required the court in the exercise of its judicial functions to fix the length of such term within the prescribed limits. As this was not done and the law relating to indeterminate sentences cannot be read into this sentence, the sentence is void.

The relator is remanded to the custody of the respondent, warden of the state prison, who will deliver him to the district court of Ramsey county for the imposition of a lawful sentence nunc pro tunc.

STATE EX REL. ROBERT HENDERSON v. C. S. REED.[1]

July 20, 1917.

Nos. 20,516—(253).

Case followed.

Upon the relation of Robert Henderson the district court for Washington county granted its writ of habeas corpus directed to the warden of the state prison. The respondent made return and on the return day the writ

[1]Reported in 163 N. W. 985.

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was discharged, Nethaway, J. From the order of discharge, relator appealed. Remanded with directions.

Thomas J. Newman and *Harvey O. Sargeant*, for appellant.

Lyndon A. Smith, Attorney General, and *C. Louis Weeks*, Assistant Attorney General, for respondent.

PER CURIAM.

This case is in all respects similar to that of State v. Reed, supra, page 468, 163 N. W. 984. The two cases were submitted together upon the same facts and the same argument. For the reasons stated in that case, the relator is remanded to the custody of the respondent, the warden of the state prison, who will deliver him to the district court of Ramsey county for the imposition of a lawful sentence nunc pro tunc.

STATE EX REL. W. B. GIBSON v. W. J. JULIUS.[1]

August 3, 1917.

No. 20,603.

Criminal law — hearing before committing magistrate — evidence.

Evidence of complaining witness was reduced to writing. On the hearing before the magistrate she refused to testify as to the facts, but did testify that the facts contained in the written statement were true. *Held*: That while the evidence might not be sufficient to support a conviction, it warranted the magistrate in finding that a crime had been committed and there was probable cause for holding defendant to the grand jury. [Reporter.]

Upon the relation of W. B. Gibson, the district court for Brown county granted its writ of habeas corpus directed to the sheriff of that county. From an order discharging the writ and remanding the prisoner, Olsen, J., relator appealed. Affirmed.

Alfred W. Mueller, for appellant.

Lyndon A. Smith, Attorney General, *James E. Markham*, Assistant Attorney General, and *A. Frederickson*, County Attorney, for respondent.

PER CURIAM.

On examination before a justice of the peace upon a charge of carnal know-

[1]Reported in 166 N. W. 226.

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ledge of a female child of the age of 17 years, the petitioner was ordered to recognize in the sum of $1,000, for his appearance at the next general term of the district court of Brown county, Minnesota, which convenes the second week in December, and, upon failure so to do, was committed to the county jail where he now is. The testimony of the witnesses was reduced to writing and returned and filed in the district court. On July 6, 1917, the relator was brought before the district court upon a writ of habeas corpus issued by said court for the purpose of being discharged. The court discharged the writ and remanded the relator to jail. Relator appeals from this order.

The sole contention of relator on this appeal is that there was no competent evidence on the hearing before the committing magistrate reasonably tending to show that a crime was committed, or that there was probable cause for believing relator guilty. The complaining witness refused to testify on the hearing to the material facts, but she did testify that the facts contained in a written statement made by her a few days after the crime was committed were true. On the entire record we think that the evidence, though it might not be sufficient to support a conviction, was sufficient to justify the justice in finding that a crime had been committed, and that there was probable cause for holding the defendant to the grand jury.

Order affirmed.

MARKO CHAPKO v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.[1]

October 12, 1917.

No. 20,474.

Damages — not excessive.

Action for personal injury. Verdict for $11,500. *Held*: While the evidence, mostly from expert medical witnesses, and based largely upon X-ray photographs, was flatly contradictory, if true, it presented a question for the jury and fully supported the verdict. [Reporter.]

Action in the district court for Ramsey county to recover $22,000 for injuries received while in defendant's employ. The answer alleged the injuries were caused by the negligence of plaintiff. The case was tried before

[1]Reported in 164 N. W. 366.

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Hanft, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for $11,500. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Barrows & Stewart, for appellant.

Douglas, Kennedy & Kennedy, for respondent.

PER CURIAM.

This action was brought to recover for personal injuries alleged to have been caused by the negligence of defendant. Plaintiff had a verdict and defendant appealed from an order denying its alternative motion for judgment or a new trial.

Two contentions are made in support of the appeal: (1) That the court erred in its charge to the jury; and (2) that the damages are excessive. No useful purpose would be served by a discussion of the facts.

We find no sufficient merit in either contention to justify a reversal. The point in reference to the claim of error in the charge is that the court thereby submitted to the jury a ground of negligence which the evidence wholly failed to sustain. We find from the record that the particular fact, claimed to have been erroneously submitted to the jury, was to some extent supported by evidence, and therefore a proper matter for the consideration of the jury upon the issues presented, though perhaps not sufficient to establish a negligent act. And even though the charge may be said to have been technical error, in the particular form given, we are clear that no prejudice resulted therefrom. In respect to the question of damages we can only say that, though the amount awarded seems large, yet the evidence presented by plaintiff, if true, amply supports the same. The testimony as to the nature and character of plaintiff's injury was mostly from expert medical witnesses, based largely upon X-ray photographs, and is flatly contradictory; presenting a question for the jury. We find from the record no basis for interference.

Order affirmed.

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JOHN M. HOGGARTH v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.[1]

October 19, 1917.

No. 20,524.

Judgment notwithstanding verdict.

Judgment notwithstanding verdict will never be granted for error in either law or procedure committed at the trial. [Reporter.]

Appeal and error — assignments of error.

Where there was no motion for a new trial, the errors assigned upon the excessive amount of recovery, the instructions, and the rulings at the trial cannot be considered. [Reporter.]

Appeal and error — motion for judgment notwithstanding verdict.

The only question on appeal from a judgment, motion for judgment notwithstanding the verdict having been denied, is whether there is any competent evidence reasonably tending to sustain the verdict. If the verdict be thus sustained the judgment must stand. [Reporter.]

Railway — question of negligence for the jury.

Plaintiff's foot was caught in an unblocked frog of a switch which belonged to defendant railway and connected sidetracks built on land of an elevator company with defendant's right of way. *Held*: Whether defendant was liable for the condition of the switch was a question for the jury. [Reporter.]

Action in the district court for Hennepin county to recover $20,000 for personal injuries received while in the employ of Kasota Elevator Company. The answer alleged that, if plaintiff received any injury, it was through the handling of cars on the premises of the elevator company and that they were not operated by defendant company, and plaintiff failed to observe ordinary care. The case was tried before Waite, J., who when plaintiff rested denied defendant's motion for a directed verdict, and a jury which returned a verdict for $6,600. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

F. M. Miner and *M. M. Joyce*, for appellant.

Frank H. Morrill, for respondent.

[1]Reported in 164 N. W. 658.

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PER CURIAM.

After trial defendant moved for judgment notwithstanding the verdict. The motion was denied. From the judgment entered pursuant to the verdict defendant appeals. Since there was no motion for a new trial the errors assigned upon the excessive amount of recovery, the instructions of the court, and rulings at the trial cannot be considered. Northwestern M. & T. Co. v. Williams, 128 Minn. 514, 151 N. W. 419; Daily v. St. Anthony Falls Power Co. 129 Minn. 432, 152 N. W. 840. "The above cases and the cases cited therein, also established the rule that judgment notwithstanding the verdict will never be granted for error in either law or procedure committed at the trial." Bosch v. Chicago, M. & St. P. Ry. Co. 131 Minn. 313, 155 N. W. 202. Therefore the only question before us is "whether there is any competent evidence reasonably tending to sustain the verdict." If the verdict be thus sustained the judgment must stand. Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958, and cases cited in the second paragraph of section 393, Dunnell, 1916 Minn. Dig. Supp.

The action was for recovery of damages for injuries received when plaintiff's foot was caught in an unblocked frog at a railroad switch. That a jury may find actionable negligence in the failure to properly block a railroad frog at a place where men are required to work goes without saying. Nor can there be any question that plaintiff's alleged contributory negligence was for the jury. The only debatable proposition in the case is whether the jury were justified in holding defendant responsible for the unblocked frog. Plaintiff's evidence showed that defendant's right of way is adjacent to certain grain elevators owned by plaintiff's employer. That these elevators are served by defendant through three side tracks located upon land of the elevator company. That at times defendant stores its empties on these tracks. That defendant installed a cross-over track joining these side tracks, the unblocked frog which caused the injury being on the switch of this cross-over track. That this cross-over track belongs to defendant, but under what arrangement it was located upon the elevator company's land is not disclosed. The inference is that the mutual interest of both companies demanded its construction. We think defendant's liability for the condition of the switch was for the jury.

Affirmed.

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JOHN McVEY MONTGOMERY v. ELSIE M. LENNARTZ.[1]

October 26, 1917.

No. 20,468.

Case followed.

Action in the municipal court of Minneapolis to recover $300. The case was tried before Montgomery, J., who made findings and ordered judgment in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

N. E. Pardee and *P. L. Solether*, for appellant.

C. E. Purdy, for respondent.

PER CURIAM.

This case is controlled by the decision in the case of Lennartz v. Montgomery, supra, page 170, 164 N. W. 899, wherein it is held that the contract involved in the action is valid and enforceable.

Order affirmed.

AMBROSE SCHMITT v. CITY OF MINNEAPOLIS AND ANOTHER.[2]

October 26, 1917.

No. 20,520.

Damages — verdict not excessive.

Action for personal injury. Verdict for $300. The physician testified the injury was permanent. Plaintiff's wife was unable to attend to her duties for several months and plaintiff cared for her in person. There was no evidence as to a money outlay. *Held*: The verdict was not excessive. [Reporter.]

Action in the district court for Hennepin county against the city of Minneapolis and the Minneapolis & St. Louis Railroad Company to recover $2,500 for injuries received by plaintiff's wife while crossing a bridge over the tracks of the railroad company. The case was tried before Hale, J.,

[1]Reported in 164 N. W. 901.

[2]Reported in 164 N. W. 901.

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who when plaintiff rested denied motions for a directed verdict in favor of each defendant, and a jury which returned a verdict for $300. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant Minneapolis & St. Louis Railroad Company appealed. Affirmed.

F. M. Miner and *M. M. Joyce*, for plaintiff.

Frank W. Booth, for respondent.

PER CURIAM.

The plaintiff is the husband of the plaintiff in Schmitt v. City of Minneapolis, supra, page 193, 164 N. W. 801, and brings this action to recover damages sustained by him through the injuries to his wife considered in the case cited. He had a verdict for $300 and the defendant railway appeals. The only question material here and not considered in the case cited is whether the damages are excessive. The evidence is meager. There was no evidence as to expenses of medical attention. The wife was unable to perform her usual duties for several months and according to her physician her injury is permanent. The plaintiff in caring for her used his own time and services. There is no evidence as to a money outlay. We cannot say that the damages are excessive.

Order affirmed.

MALCOLM J. ALDRICH v. SENTINEL PUBLISHING COMPANY AND OTHERS.[1]

November 2, 1917.

No. 20,485.

Attachment — debt fraudulently contracted.

Action by stockholder in behalf of the corporation for an accounting by defendant officers for moneys received by them. The court granted a motion to dissolve the writ of attachment, obtained on the ground the debt was fraudulently contracted, after considering the pleadings, affidavits and files. *Held*: The order dissolving the attachment must be deemed as finding the facts in favor of defendants, so far as they were in issue, and those facts justified a finding the debt was not fraudulently contracted. [Reporter.]

[1]Reported in 164 N. W. 992.

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Action in the district court for Martin county. From an order, Catherwood, J., granting defendants' motion to dissolve the writ of attachment, plaintiff appealed. Affirmed.

Albert R. Allen and *Frank E. Dougherty*, for appellant.

Haycraft & Palmer, for respondents.

PER CURIAM.

Plaintiff as a stockholder brought this action on behalf of defendant corporation to compel the individual defendants, who are directors and officers of the corporation, to account for and repay to the corporation certain amounts which they as directors had paid to themselves as salaries, and certain other amounts claimed to have been paid for unauthorized purposes and for unnecessary help, and caused a writ of attachment to be issued against the individual defendants upon the statutory ground "that the debt * * * was fraudulently contracted." On motion the district court, after examining and considering "the pleadings, affidavits and files in said cause" dissolved the attachment. Plaintiff appealed from this order.

The order dissolving the attachment must be deemed as finding the facts in defendants' favor so far as they were in issue; and such facts were sufficient to justify the court in holding that the alleged cause of action was not a debt fraudulently contracted.

Order affirmed.

ERNEST KNOLL v. BENJAMIN BLANCHARD AND ANOTHER.[1]

November 2, 1917.

No. 20,489.

Judgment — vacating default.

The trial court acted within its discretion in vacating the judgment and permitting one of the defendants to answer. [Reporter.]

Action in the municipal court of St. Paul to recover $203.75 upon promissory notes. The motion of Adelia F. Blanchard for an order to show cause why the default judgment should not be vacated and defendant be permitted to serve an answer, was granted, Finehout, J. From the order granting the motion, plaintiff appealed. Affirmed.

Moritz Heim, for appellant.

Cormican & Hoff, for respondent.

[1]Reported in 164 N. W. 992.

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PER CURIAM.

On January 9, 1917, judgment was entered by default against defendants, in the municipal court of the city of St. Paul. February 6, the court, upon motion vacated the judgment and permitted defendants to file an answer, and set the case for trial on June 18, 1917. The defendant, Adelia F. Blanchard, claimed that the summons was never served upon her and offered proof to that effect.

The trial court acted within its discretion and the order appealed from is affirmed.

WILLIAM STEINKEMPER v. ERNEST BECKMAN.[1]

November 2, 1917.

No. 20,523.

Appeal and error — waiver of point.

An assignment of error not argued in appellant's brief, is waived. [Reporter.]

Landlord and tenant — charge to jury not prejudicial.

Action by landlord for value of corn which should have been husked and delivered at elevator. Defense that because of hail and failure to mature only small quantity of fodder corn was raised which was fed to defendant's cattle. Court charged the jury that plaintiff could only recover for corn that had a market value after it was husked, not for the value it might have standing in the field for fodder. *Held*: Even if abstractly incorrect as a proposition of law, in view of the evidence in the case, the charge was not prejudical. [Reporter.]

Action in the district court for Nobles county to recover $179.75. The facts are stated in the opinion. The case was tried before Nelson, J., and a jury which returned a verdict for $73.76 in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

J. A. Cashel, for appellant.

J. A. Town, for respondent.

PER CURIAM.

Plaintiff, the owner of a farm in Nobles county, leased it to defendant for the years 1915, 1916 and 1917. He brought this action against the tenant seeking to recover $179.75, made up of $75 damages suffered by defendant

[1]Reported in 164 N. W. 802.

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not saving and husking the 1915 corn crop, but instead feeding it to his cattle and hogs, and a balance of $104.75, alleged to be due as the cash rent provided to be paid for hay and pasture land. The answer admitted this last item, alleged that because of hail and the failure to mature no corn was raised on the farm in 1915, save a little fodder corn which defendant admitted feeding to his cattle. Defendant set up four counterclaims, and asked judgment in his favor for $139.08, being the amount alleged to be due on the counterclaims after deducting the sum admittedly due plaintiff. The counterclaims were for board furnished plaintiff and for services rendered him by defendant. In his reply plaintiff admitted the second counterclaim amounting to $25, admitted that defendant furnished him board of the value of $144, and rendered services of the value of $66, as alleged, but claimed that by agreement with defendant he had paid these items by rendering services to the defendant. The issues were submitted to the jury, and a verdict returned in favor of defendant for the sum of $73.76. Plaintiff appeals from an order denying a new trial.

The assignment of error challenging the sufficiency of the evidence to sustain the verdict is not argued in the brief of appellant, and is therefore waived.

The sole question for decision is whether there was prejudicial error in the charge to the jury relative to plaintiff's claim of a right to recover for the corn which defendant's cattle ate. The lease provided that the tenant "is to deliver the landlord's one-third share of all small grain and corn at elevator in Wilmont, Minn., free of expense to landlord and at his request." No corn was so delivered in 1915, because there was none to deliver for the reason previously stated. The court instructed the jury that plaintiff could only recover for corn that had a market value after it was husked, "not what value it might have standing in the field for fodder." This was on the theory that because the lease required the tenant to husk the corn and deliver it to the elevator, there could be no recovery if the corn was so damaged or immature as to have no market value after it was husked, even though it might have a value as fodder corn, and though the tenant had used it all to feed his cattle. It may be open to question whether the court was correct in this instruction, considered as as abstract proposition of law. But in view of the evidence we see no prejudice. Plaintiff apparently had no complaint if the corn was only fit to feed in the field. His claim was that it had a market value as husked corn. Defendant claimed it had not. In view of these claims, we are not prepared to say that there was anything prejudicial in the instruction even conceding it to have been erroneous. The amount of the verdict does not indicate prejudice. The result is probably as nearly a right one as any jury could arrive at.

Order affirmed.

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O. K. HAUGEN AND ANOTHER v. PAUL KING.[1]

November 2, 1917.

No. 20,562.

Appeal and error — review.

Action on promissory note. The court found the facts against defendant's defense. The findings are sustained. The facts being against him the questions of law raised by him cannot be considered on appeal. [Reporter.]

Action in the municipal court of Mankato to recover $25 upon a promissory note. The case was tried before Plymat, J., who made findings and ordered judgment for $37.38. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

L. L. Larson, for appellant.

C. O. Dailey, for respondents.

PER CURIAM.

This action was brought to recover upon a promissory note alleged to have been made by defendant in payment of goods purchased from plaintiff. The answer put in issue the making of the note, pleaded the infancy of defendant and the statute of limitations. The court found the facts against defendant, and the only question before the court on the appeal is whether the evidence supports the findings. The evidence returned in the record is sufficient. It requires no discussion. And since the facts are found adversely to defendant the questions of law raised by him cannot be considered. They are all predicated upon the facts as pleaded in the answer, which are wholly eliminated from the case by the findings.

Judgment affirmed.

[1]Reported in 164 N. W. 991.

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ALBERT ERLITZ AND ANOTHER v. WILLIAM BARCLAY AND OTHERS.[1]

November 9, 1917.

No. 20,503.

Judgment — action to restrain enforcement — complaint defective.

Action to restrain enforcement of money judgment. Personal service of summons. Time had expired within which court could grant relief from default. Complaint did not deny the fact of personal service, but alleged that defendants had no recollection of it and, if it was so made, by inadvertence and without intentional neglect these plaintiffs either assumed that the summons referred to other matters or overlooked it. *Held*, as against a demurrer, the complaint was bad. [Reporter.]

Action in the district court for Washington county to set aside a judgment entered in the municipal court of Stillwater, to vacate all executions and levies thereunder, and for a permanent injunction restraining defendants from taking further proceedings in the municipal court. From an order denying their motion for a temporary injunction, and from an order sustaining the demurrer of the sheriff of Washington county to the complaint, Nethaway, J., plaintiffs appealed. Affirmed on both appeals.

Wilson & Thoreen, for appellants.

Comfort & Comfort, for respondents.

PER CURIAM.

William Barclay and Douglas M. Barclay, copartners as Barclay Bros. and residents of the state of Vermont, recovered a money judgment in the municipal court of the city of Stillwater against Albert Erlitz and Alex Erlitz, and caused an execution to be issued thereon to the sheriff of Washington county who made a levy thereunder upon certain personal property of Albert Erlitz. Thereupon Albert Erlitz and Alex Erlitz brought this action to enjoin the sheriff and the other defendants named in their complaint from collecting or enforcing the judgment of the municipal court. They applied for a temporary injunction which the court refused, and they appealed from the order refusing it. The sheriff demurred to their complaint. The demurrer was sustained, and they appealed from the order sustaining it. By stipulation the appeals were submitted together upon the same record.

[1]Reported in 164 N. W. 905.

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The complaint does not charge fraud or improper conduct on the part of any of the defendants. The record of the action in the municipal court, which is attached to and made a part of the complaint, shows that the summons in that action was served personally upon both the defendants therein. In the present action they do not deny the fact that such service was made, but assert that they have no recollection of it, and, if the service was in fact made, that, by inadvertence and without intentional neglect, they either assumed that the summons referred to other matters or overlooked it. These allegations and the fact that the time had expired in which relief from its judgment could be granted by the municipal court form the only basis for the present action, and are clearly insufficient to justify enjoining the enforcement of the judgment in question. If, after the time to appeal has expired, a judgment could be assailed in this manner and upon such grounds, there would be no end to litigation. Both orders are affirmed.

LAKE HARRIET STATE BANK OF MINNEAPOLIS v. O. H. MILLER AND ANOTHER.[1]

November 16, 1917.

No. 20,552.

Evidence — parol evidence to vary promissory note.

Action on promissory note against maker and indorser. Defendant indorser offered evidence of a verbal agreement that he was not to become personally liable on his indorsement and that the president of plaintiff bank at the time of the indorsement agreed to stamp over his indorsement the words "without recourse." This was not done. *Held*: The evidence was inadmissible as its only effect was to vary the contract. [Reporter.]

Action in the district court for Hennepin county to recover $1,851 upon a promissory note. The case was tried before Fish, J., and a jury which returned a verdict for $2,153.33. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, John Devney appealed. Affirmed.

Albert L. Hershman, for appellant.

McDowell & Fosseen, for respondent.

[1]Reported in 164 N. W. 989.

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PER CURIAM.

Defendant Miller made and delivered to defendant Devney, in payment for the latter's stock in plaintiff bank, his certain promissory note for the sum of $1,851, payable on demand after date. The note was negotiable and thereafter Devney for value and in the usual course of business indorsed and transferred it to plaintiff. The indorsement was in blank, thereby imposing an unconditional liability upon Devney. There was default in the payment and this action was brought to recover against both the maker and indorser. Defendant Devney, the indorser, interposed in defense an alleged verbal agreement that he was not to become personally liable on the indorsement and that at the time the note was so indorsed the president of plaintiff bank agreed to stamp over defendant's signature the words "without recourse," and thus give force and effect to the agreement. The agreement if made was never carried out by the president of the bank, and when the note was subsequently transferred to the bank it bore defendant's blank indorsement only. At the conclusion of the trial the court ruled that the evidence tending to show the verbal agreement, which was all objected to by plaintiff, was incompetent, because varying and contradicting the written contract as evidenced by the note and blank indorsement, and a verdict was directed for plaintiff.

In this the court was entirely right. The evidence of the verbal agreement referred to was clearly incompetent, and was properly finally rejected by the court. Its only effect was to contradict the contract, as evidenced by the blank indorsement, and was no defense to the action. Knoblauch v. Foglesong, 38 Minn. 352, 37 N. W. 586, and cases therein cited. Westman v. Krumweide, 30 Minn. 313, 15 N. W. 255, and other like cases are not in point. They are clearly differentiated in Security Nat. Bank of Minneapolis v. Pulver, 131 Minn. 454, 155 N. W. 641.

Order affirmed.

NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY v. SOLOMON COUPLIN AND OTHERS.[1]

(Nineteen Cases.)

November 16, 1917.

Nos. 20,612, 20,613, 20,614, 20,615, 20,616, 20,617, 20,618, 20,619, 20,620, 20,621, 20,622, 20,623, 20,624, 20,625, 20,626, 20,627, 20,628, 20,629, 20,630.

Actions in the district court for Ramsey county to cancel certain benefit

[1]Reported in 164 N. W. 1016.

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certificates or to determine the amount due and order payment. The cases were tried together before Kelly, J., who made findings and ordered judgment in favor of defendants. From orders denying its motion to set aside the form of judgment signed by the deputy clerk of court and enter judgment in accordance with the amended findings, plaintiff appealed. Reversed.

William G. White, for appellant.

A. J. Hertz and *James E. Markham*, for respondents.

PER CURIAM.

These cases are controlled by the decision in the case of National Council of the Knights and Ladies of Security v. Silver, supra, page 330, 164 N. W. 1013.

Order reversed.

JAMES JENSEN v. JOHN FISCHER AND ANOTHER.[1]

November 23, 1917.

No. 20,557.

Father liable for negligence of son — question for jury.

Whether the father was liable for his son's negligence in driving the father's automobile was a question for the jury. The evidence was substantially the same as on the former trial, and the decision there is controlling here. [Reporter.]

Action in the district court for Ramsey county to recover for injuries received in a collision with an automobile and for medical services. The case was tried before Michael, J., and a jury which returned a verdict for $10,000. From the judgment entered pursuant to the verdict, John Fischer appealed. Affirmed.

Denegre & McDermott and *Harry S. Stearns*, for appellant.

Stan J. Donnelly and Stan Dillon Donnelly, for respondent.

PER CURIAM.

Action to recover damages on account of injuries resulting from a collision with an automobile. The plaintiff had a verdict against John Fischer upon which judgment was entered, and from this judgment defendant appealed.

On July 2, 1915, John Fischer owned a large Packard touring car which

[1]Reported in 165 N. W. 1055.

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he kept as a pleasure car for the use of his family and himself. On the evening of that day, his son Edward, the other defendant herein, was driving the car upon and along Case street. A collision occurred between defendant's car and the motorcycle upon which the plaintiff was riding, resulting in the injury complained of.

There was a former trial of this case where the plaintiff had a verdict against the defendant Edward Fischer, the court having directed a verdict in favor of the defendant John Fischer. Plaintiff moved for a new trial against John Fischer, which was denied. On appeal a new trial was granted upon the ground that the evidence made his liability for his son's negligence a question for the jury. 134 Minn. 366, 159 N. W. 827. The case was subsequently retried as to John Fischer and a verdict rendered against him. He moved for judgment notwithstanding the verdict.

The only question here presented is whether the testimony had upon this trial was sufficient to warrant the jury in holding the defendant John Fischer responsible for the act of his son Edward, as driver of the automobile on the occasion in question.

It is earnestly urged on behalf of appellant that the proofs offered in his behalf upon the second trial were not only consistent with those upon the first trial, but were sufficient to take the case from under the law established upon the former trial and appeal, and to establish conclusively that this defendant was not, as a matter of law, responsible for the acts of his son in having and driving the car upon this occasion.

A careful consideration of the testimony offered upon the retrial of this case compels us to the conclusion that the evidence made respondent's liability for his son's negligence a question for the jury. We discover no substantial difference between this testimony and that had upon the former trial, and that decision is controlling here.

Affirmed.

JOHN G. LUNDQUIST v. JOHN W. PETERSON AND ANOTHER.[1]

November 30, 1917.

No. 20,561.

Accounting.

Case remanded with directions to credit plaintiff with certain amounts and to credit defendants with certain other amounts, to make the neces-

[1]Reported in 165 N. W. 138.

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sary amendments to the findings of fact and conclusions of law, and credit plaintiff with the balance found to be due to him. [Reporter.]

After the former appeal reported in 134 Minn. 279, 158 N. W. 426, 159 N. W. 569, there was a retrial of the accounting before Daly, J., who made further findings, ordered judgment in favor of plaintiff for $14,273.54, and dismissed the action as to Caroline Peterson. Plaintiff's motion for amended findings was denied. Defendants' motion for amended findings was denied. From an order denying their motion for a new trial, defendants appealed. Remanded with directions to amend the decision in accordance with the opinion.

Lancaster, Simpson & Purdy, Alva R. Hunt and *E. P. Peterson*, for appellants.

H. E. Fryberger and *L. K. Sexton*, for respondent.

PER CURIAM.

In our decision on the former appeal in this case, reported in 134 Minn. 279, 158 N. W. 426, 159 N. W. 569, we held that the evidence sustained the findings of the trial court that defendants made fraudulent representations to the plaintiff at the time he transferred to them his interest in the property of a copartnership composed of plaintiff and defendants; that the evidence sustained a finding that plaintiff believed and relied upon such representations and was induced by them to make the transfer; that the action was not barred by the statute of limitation, and that the trial court did not err in requiring defendants to account to the plaintiff for the amount of his original investment, with interest, less sums received by him from the copartnership. But we held that in taking the account not all the moneys received by plaintiff were charged against him, and ordered a new account taken, unless plaintiff should consent that the accounting be changed by adding to the amount adjudged to be due from the defendants to plaintiff the sum of $4,000 as of May 1, 1889, and by deducting therefrom the sum of $2,000 as of September 30, 1889; the sum of $2,000 as of March 1, 1890; the sum of $1,500 as of December 1, 1891; and the sum of $2,000 as of September 16, 1897. Plaintiff consented to this change, but on motion of defendants a reargument was granted on the question of the accounting. On the reargument we held that in making the accounting the $5,000 paid by defendants to plaintiff September 16, 1897, which in avoiding the transaction plaintiff was obliged to repay to defendants, should draw interest from the date of its payment, and be applied when the final reckoning is had. We concluded that, in view of the uncertainty as to the true status of the account, a new trial of the accounting should be had without an option in the plaintiff to consent to a reduction. We said that upon the retrial the court is not concluded by "anything

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said in this or the former opinion relative to the status of the account."

The retrial ordered was had on the evidence introduced on the former trial and some new evidence. The court filed a decision substantially the same as its original decision. It found the amount of plaintiff's original contribution to the partnership to be the sum of $14,303.54, the same as found on the first trial, but allowed plaintiff interest on this sum from June 1, 1888, instead of from January 1, 1890, as was done by the former decision. The same deductions were allowed. The trial court did not follow our ruling as to the application of the $5,000 paid by defendant and interest from the date of the payment, but adhered to its original decision in this regard, applying the ordinary partial payment rule. It did not allow any of the payments, aggregating $7,500, which are discussed in our original opinion, except as $4,000 of these payments are allowed in paragraph 5 of the findings as offsetting additional contributions by plaintiff of that amount. This paragraph 5 is the same indefinite finding discussed on pages 286 and 287 of the opinion on the former appeal. It is that, in addition to his original contribution in 1888, plaintiff advanced an amount aggregating more than $4,000, and that the sums received by plaintiff from defendants, in excess of those credited, were not so much as $4,000. Our decision before was that the finding that plaintiff received as little as $4,000 in excess of the amount of $839.70, allowed by the findings as a credit, was not sustained by the evidence. We said that we were unable to find from the evidence that plaintiff had paid into the copartnership as much as $4,000 in addition to his original investment, but that if this were the only item of the account we ought not to disturb the finding.

After the decision of the lower court on the retrial of the accounting, defendants moved for amended findings and for a new trial. Plaintiff also moved for amended findings. These motions were all denied, except that the trial court ordered his memorandum made a part of the decision. Defendants appealed from the order denying a new trial.

It is clear that the trial court should have allowed defendants interest at the legal rate on the $5,000 paid to plaintiff September 16, 1897, on the settlement, to be applied as held in the opinion on reargument. This was definitely decided on the reargument, is the law of the case, and we still think, sound law. Plaintiff admits the $1,500 payment of December, 1891. In these respects it is hardly open to question that the decision below was wrong. Counsel for plaintiff seeks to sustain the failure to allow these and other credits by insisting that the trial court should have found plaintiff's contributions to the copartnership to be much greater than it did find them to be. This claim cannot be sustained, as plaintiff has not appealed. Indeed we have the same difficulty as before in sustaining the finding that plaintiff advanced as much as $4,000 after his original con-

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tribution, but have concluded that the amount of plaintiff's total contribution should stand as found by the trial court.

The case is not made clearer by the following excerpt from the memorandum of the trial court, made a part of the decision:

"The parties had a great number of business transactions herein, the plaintiff advanced large sums of money to defendants as individuals and wherein the defendants collected large sums of money from third persons and belonging to [plaintiff], but these transactions were aside from the partnership and only have a collateral bearing on the same. The partial settlement in 1890 had reference solely to such collateral transactions. It seems to the writer after a careful consideration of all the testimony that there can be no doubt but that all the money received by the plaintiff that should be credited on the capital invested is what was received from the sale of real estate including the amount received from Peter Christianson and $5,000 paid in September, 1897."

In saying that in these transactions "plaintiff advanced large sums of money to defendants as individuals," we do not understand that the court intended to find that plaintiff contributed nothing to the partnership after his original investment. The court refused to strike out paragraph 5 of the findings, though both parties requested it. We assume that the advancements referred to in the memorandum were in addition to the $4,000 found in paragraph 5. Nor can we assume, as suggested by counsel for defendants, that the court refused to credit payments made by defendants on the ground that they were payments of dividends or profits, as, in the shape the accounting was made, there can be no doubt that all payments by defendants to plaintiffs, except on matters "aside from the partnership," should be credited against plaintiff's contributions to the firm. We interpret this part of the memorandum simply as a finding that the payments made by defendants and not credited were made on these so-called "collateral transactions."

We are satisfied, as we were on the former appeal, that the evidence does not sustain the finding that plaintiff received as little as $4,000 in excess of the $839.70 allowed. We think it is practically conclusive that the four items, aggregating $7,500, were received as and at the dates stated in the former opinion. A new trial is unnecessary. The case is remanded to the trial court with directions to amend its decision as follows: Credit plaintiff with the amount of his original contribution as found, with legal interest from June 1, 1888, less the credits allowed by the findings, and with $4,000 as of May 1, 1889, with legal interest from that date; credit defendants with interest on the $5,000 applied as herein held it should be, and with the following payments: $2,000 as of September 30, 1889; $2,000 as of March 31, 1890; $1,500 as of December 1, 1891, and $2,000 as of Septem-

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ber 16, 1897; these four payments to be applied under the ordinary mercantile rule applicable to partial payments. Make the necessary amendments to the findings of fact and conclusions of law and order judgment for the balance due plaintiff after it is ascertained by the method indicated.

LOUIS H. JOSS v. E. LUTHER MELIN AND ANOTHER.[1]

November 30, 1917.

No. 20,568.

Order not appealable.

Appeal from decision and order for judgment dismissed. [Reporter.]

Action in ejectment in the municipal court of Minneapolis. The case was tried before Montgomery, J., who made findings and ordered judgment in favor of plaintiff for immediate possession of the premises. From that order and decision, defendants appealed. Appeal dismissed.

E. Luther Melin, for appellants.

Roberts & Strong, for respondent.

PER CURIAM.

The appeal in this case is from the decision and order for judgment of the trial court. It must be and is dismissed.

[1]Reported in 165 N. W. 1074.

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ACCORD AND SATISFACTION. See COMPROMISE AND SETTLEMENT.

Defendant pleaded accord and satisfaction. When plaintiff insisted on compensation defendant mailed him a check for $5 without any letter. There had been no previous talk of a settlement for that or any other amount. *Held*: The evidence did not raise an issue of accord and satisfaction.
—Matloch v. Jerabek, 128, 131.

ACCOUNTING. See ATTACHMENT.

Case remanded with directions to credit plaintiff with certain amounts and to credit defendants with certain other amounts, to make the necessary amendments to the findings of fact and conclusions of law and credit plaintiff with the balance found to be due to him.
—Lundquist v. Peterson, 484.

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Every advancement is a gift. Even in cases of intestacy it remains a gift. An advancement is never to be returned. In case of intestacy, the gift reduces by so much the share of the heir receiving it, while in case of testacy the gift becomes absolute.
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ADVERSE POSSESSION—Continued.

farm occupied by him under a mistake as to the true boundary line. Title may be acquired by adverse possession though the occupancy is under a mistake as to boundary. The usual elements of adverse possession must exist and the evidence in proof of it must be clear and convincing. Upon an examination of the evidence it is *held* that the question of adverse possession was one of fact and the direction of the verdict was error.

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1. An order denying a motion for a change of venue is not appealable.
—Kay v. Elsholtz, 154.

2. Action in ejectment. Judgment for plaintiff ordered. Appeal by defendant from the order and decision. Appeal dismissed.
—Joss v. Melin, 488.

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3. When plaintiff, at the trial of this action, wished to procure the files of the action for the foreclosure of mechanics' liens for the purpose of proving notice to defendants to defend the lien action and an agreement to do so, defendants assured him such proof was unnecessary as they made no claim they had not been given opportunity to defend that action, and plaintiff rested on this assurance. *Held*: Defendants cannot now take advantage of plaintiff's failure to present such proof.
—Milavetz v. Oberg, 222.

OBJECTION TO RIGHT TO SUE WAIVED AT TRIAL.

4. Where, in an action to determine adverse claim to real estate, defendants plead title in themselves and set out the source thereof, and also specify the source and defects which they claim in plaintiff's title, and the same is litigated upon the trial, they waive the right to claim that the action was improperly brought.
—Baker v. Berg, 110.

FAILURE TO EXCEPT TO ADMISSION OF EVIDENCE.

5. Where no objection is made nor exception taken to the admission of improper evidence, and its admission is not assigned as error, this court must consider it as properly in the case.
—Lovell v. Beedle, 13.

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EFFECT OF FILING BRIEF.

6. Two of the defendants are the only appellants. Another defendant was not served with the notice of appeal, but he filed a brief as respondent and appeared in the supreme court and is bound by the result reached.
—Shraiberg v. Hanson, 81.

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7. An assignment of error not argued in appellant's brief, is waived.
—Steinkemper v. Beckman, 477.

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8. Where one of the answering defendants was not served with notice of appeal from an order denying plaintiff's motion for a new trial, an alleged error in not directing a verdict against such defendant cannot be considered.
—William J. Burns International Detective Agency v. Holt, 166.

9. Where there was no motion for a new trial the errors assigned upon the excessive amount of recovery, the instructions, and the rulings at the trial cannot be considered.
—Hoggarth v. Minneapolis & St. Louis Railroad Co. 472.

SAME — MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT.

10. As defendant asks for judgment notwithstanding the verdict without asking for a new trial, the only question presented is whether the record shows that plaintiff is not entitled to recover.
—Martin v. Minneapolis & St. Louis Railroad Co. 40.

11. General verdict in favor of plaintiff. Defendant's motion for judgment notwithstanding the verdict was granted. Plaintiff appealed. On appeal the question is whether, although the jury found against defendant, the evidence was such as to justify judgment in its favor notwithstanding the verdict.
—Olsson v. Midland Insurance Co. 426.

SAME — OF QUESTIONS OF LAW WHEN WITHOUT BASIS OF FACT.

12. Action on promissory note. The court found the facts against defendant's defense. The findings are sustained. The facts being

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APPEAL AND ERROR—Continued.

against him, the questions of law raised by him cannot be considered on appeal.
—Haugen v. King, 479.

SAME — OF QUESTION WHETHER VERDICT IS SUSTAINED BY EVIDENCE.

13. The only question on appeal from a judgment, motion for judgment notwithstanding the verdict having been denied, is whether there is any competent evidence reasonably tending to sustain the verdict. If the verdict be thus sustained the judgment must stand.
—Hoggarth v. Minneapolis & St. Louis Railroad Co. 472.

SAME — ORDER OF RECEPTION OF EVIDENCE.

14. A decision will not be reversed because material and proper evidence is received out of its regular order.
—Nardinger v. Ladies of the Maccabees of the World, 16.

SAME — DISCRETION OF TRIAL COURT.

15. In holding prejudicial an error in admitting certain evidence, and granting a new trial on that ground, the trial court did not abuse its discretion.
—Marks v. Brown, 405.

HARMLESS ERROR.

16. Where an insurance contract exempts the insurer from liability if death results from certain excepted causes, the burden is on the insurer to prove that death resulted from an excepted cause, even though the plaintiff negatives such facts in his complaint. An erroneous instruction by the court, that the burden of proof is on the plaintiff, cannot aid the defendant in upsetting a verdict for plaintiff.
—Nardinger v. Ladies of the Maccabees of the World, 16.

17. There was no prejudicial error in the court taking part in the examination of a witness.
—Wagner v. Seaberg, 37.

18. Action by landlord for value of corn which should have been husked and delivered at elevator. Defense that because of failure to mature only small quantity of fodder corn was raised which was fed to defendant's cattle. Court charged the jury that plaintiff could only recover for corn that had a market value after it was husked, not

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APPEAL AND ERROR—Continued.

for the value it might have standing in the field for fodder. *Held*: Even if abstractly incorrect as a proposition of law, in view of the evidence in the case, the charge was not prejudicial.

—Steinkemper v. Beckman, 477.

19. No prejudice resulted from the admission of the testimony of the wife of defendant, a mere fragment of the whole evidence tendered by defendant, of a conversation had by her with deceased, though she was interested in the homestead part of the land involved in the action, and perhaps disqualified under the statute.

—Drager v. Seegert, 6.

20. The admission in evidence of a telegram was not a violation of the rule forbidding offers of compromise to be received, for, according to the claim of plaintiff, there was then no dispute as to the validity of the claim, and, furthermore, the party objecting subsequently offered the same telegram and a response thereto in evidence.

—Flick v. Ellis-Hall Co. 365.

21. Making the judgment recovered against the building contractor the measure of liability of his sureties was not reversible error, although no proof was offered to show the nature or validity of the claims for which such judgment was rendered, as the amount thereof was less than the amount of the liens as established by the judgment in the mechanic's lien action.

—Milavetz v. Oberg, 216.

22. In an action against four defendants for an assault the evidence is *held* insufficient to justify submitting to the jury the claim of a conspiracy. The charge in submitting such claim was prejudicially erroneous as to two of the defendants, who were not conclusively shown to have participated directly in the alleged assault or as aiders or abettors; but as to the other two defendants, who actively participated, and who confessedly were either justifiably defending themselves or were the aggressors, and who were by the general verdict of the jury found to be the aggressors, it was not prejudicial for it did not affect the question of their liability nor the amount of damages to be awarded.

—Leibel v. Golden, 90.

23. An expression of opinion by the trial judge as to a disputed fact is not reversible error when the jury did not adopt the view so ex-

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APPEAL AND ERROR—Continued.

pressed. Neither was it reversible error to limit the damages recoverable to those which necessarily resulted from the breach of the contract where no claim was made that the damages proven were not the necessary result of the alleged breach.

—McArdle v. Chicago, Milwaukee & St. Paul Railway Co. 380.

24. Where the court instructed the jury that if certain facts were established plaintiff could not recover, a verdict for plaintiff necessarily found that such facts had not been established, and the giving of such instruction, although erroneous, is not ground for reversal.

—McArdle v. Chicago, Milwaukee & St. Paul Railway Co. 380.

PREJUDICIAL ERROR.

25. Plaintiff brought suit for injuries sustained in a collision at a street intersection between defendant's automobile and the automobile in which she was riding. The ordinance gave the right of way at this intersection to vehicles upon the street along which defendant was proceeding. The court ruled that the ordinance had been abrogated. *Held* prejudicial error.

—Bruce v. Ryan, 264.

LAW OF THE CASE.

See MUNICIPAL CORPORATION, 16.

26. The decision on the former appeal that defendants were entitled to legal interest on a certain payment to plaintiff, is the law of the case and adhered to.

—Lundquist v. Peterson, 486.

REMISSION OF PART OF RECOVERY.

27. In this case the verdict was not so excessive as to indicate that the jury were influenced by passion and prejudice in the determination of other issues, so as to require the granting of a new trial upon that ground.

—Larson v. Wisconsin Railway, Light & Power Co. 159.

REVERSAL OF FINDINGS OF TRIAL COURT.

28. The rule that the findings of the trial court will not be set aside by the supreme court unless manifestly and palpably against the weight of the evidence, has no application to a decision of the probate court in a matter which has been appealed and tried de novo and reversed in the district court.

—Sterling v. Miller, 192, 193.

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ATTACHMENT.

ORDER DISSOLVING ATTACHMENT EQUIVALENT TO FINDINGS FOR DEFENDANT.

Action by stockholder in behalf of the corporation for an accounting by defendant officers for moneys received by them. The court granted a motion to dissolve the writ of attachment, obtained on the ground the debt was fraudulently contracted, after considering the pleadings, affidavits and files. *Held*: The order dissolving the attachment must be deemed as finding the facts in favor of defendants, so far as they were in issue, and those facts justified a finding the debt was not fraudulently contracted.

—Aldrich v. Sentinel Publishing Co. 475.

ATTORNEY AND CLIENT.

PROVING LIEN OF ATTORNEY.

1. A transcript of proceedings in the district court in the state of Nebraska, where, defendant claims, the contract forming the basis of the cause of action in the present case was adjudicated, was properly rejected upon the ground that the Nebraska court did not pass upon the same contract.

   —Heuser v. Chicago, Burlington & Quincy Railroad Co. 286.

2. *Held*, under the evidence, that the trial court was warranted in directing a verdict in favor of intervener.

   —Heuser v. Chicago, Burlington & Quincy Railroad Co. 286.

OFFER TO PROVE SOLICITATION BY LAYMAN.

3. An offer to prove that a case came to an attorney at law through the solicitation of a layman is not admissible under an allegation to the effect that the intervener entered into some pretended agreement with plaintiff, in reference to the prosecution of the action, but that such contract was champertous, null and void and to be performed in the state of Nebraska.

   —Heuser v. Chicago, Burlington & Quincy Railroad Co. 286.

ALLOWANCE OF ATTORNEY FEES IN ACTION FOR SEPARATE MAINTENANCE OF WIFE.

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See STREET RAILWAY, 2, 3.

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See APPEAL AND ERROR, 25.

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INJURY TO ANIMAL IN BAILEE'S POSSESSION.

1. In this action to recover damages for injury to a stallion while in the care and custody of defendant as bailee, the burden of proof is upon plaintiff, the bailor, to establish that the injury resulted from defendant's negligence or breach of duty to exercise the due care required under the contract of bailment. This is so whether the bailment be gratuitous or for the mutual benefit of the parties.
—Lebens v. Wolf, 435.

2. When plaintiff proved that defendant received the animal in a good condition and returned the same with an injury which ordinarily does not happen without negligence of the keeper, a prima facie case was made out, and it was error to then dismiss the action.
—Lebens v. Wolf, 435.

BANK AND BANKING. See CORPORATION, 2-5, 16, 17.

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ACTION BY SUPERINTENDENT OF BANKS.

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BASTARD.

VENUE.

A prosecution under the statute relating to bastards is triable in the county in which the mother of the child resides, and the defendant is not entitled to have the place of trial changed therefrom to the county in which he resides.
—State ex rel. v. District Court of Blue Earth County, 77.

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CONSIDERATION.

See PLEADING, 3.

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BILLS AND NOTES—Continued.

RENEWAL NOTE — WAIVER OF FRAUD.

1. Notes were given by defendant in payment for stock in a corporation. Later, with knowledge of the facts which constituted the fraud charged, defendant exchanged his stock for bonds of the corporation and renewed the notes which he had not already paid. *Held*: The giving of renewal notes after discovery of the fraud is a waiver of the fraud.

—Thorpe v. Cooley, 431, 433.

PAROL EVIDENCE OF INDORSER TO VARY THE CONTRACT.

See EVIDENCE, 5.

2. Negotiable paper, executed as part of a transaction with a foreign corporation doing business in this state in violation of the laws relating to foreign corporations, may be enforced by a bona fide purchaser thereof.

—Finseth v. Scherer, 355.

FRAUD IN PROCUREMENT OF SIGNATURE — WHEN VOID, WHEN VOIDABLE.

3. Fraud, in procurement of a signature to a promissory note, may consist of a trick or artifice by which a person is induced to sign the note without knowledge of the fact that it is a note, as where the paper is folded in such manner as to conceal its true nature. A note procured by fraud of this character is not a contract at all and is wholly void, even in the hands of an innocent purchaser for value, unless the signer is guilty of negligence. When fraud consists of a misrepresentation which induces a real assent to the note, the note is subject to the defense of fraud and is voidable only. In the hands of a bona fide holder for value the defense of fraud is not available. In an action on such a note, the question of negligence is not an element.

—Stevens v. Pearson, 73, 74.

NOTICE OF FRAUD TO INDORSEE.

4. It is virtually conceded that the note was procured by fraud. Plaintiff is an indorsee of the note. He is a lawyer of many years' experience. He had taken thousands of dollars' worth of these notes. He knew they were detached from contracts. He left the notes in the hands of the company's attorney for collection. There had been a considerable number of suits. The company paid all expense of

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BILLS AND NOTES—Continued.

collection and litigation. *Held*: Plaintiff was chargeable with notice of the fraud.

—Stevens v. Pearson, 72, 76.

EVIDENCE OF FRAUD.

5. Defendant was a milliner conducting a small store. She was induced to order a line of toilet articles, with the understanding she was to pay for them only as sold, and if they were not sold or satisfactory, the seller would take them back. The seller's agent was charged with fraud in inducing defendant to sign what was apparently only an order, but in fact was an order with a note at the bottom with the paper perforated in such a way that the note could be detached. The form of the document was complicated and contradictory in its terms and well calculated to aid a salesman in securing from a customer a promissory note which he does not consciously give. *Held*: The defendant was not chargeable with negligence.

—Stevens v. Pearson, 72, 74, 75, 76.

6. This is an action on promissory notes. The defense is that the notes were given as purchase price on a sale procured by fraud. There is evidence sufficient to raise an issue that misrepresentations were made and that defendants suffered damage therefrom.

—Vath v. Wiechmann, 87.

FAILURE OF CONSIDERATION.

7. This action was to recover on promissory notes executed by defendants to the Farmers Elevator Company of Barry. The only defense submitted to the jury was want or failure of consideration. Defendants pleaded and proved that they were farmers in the vicinity and as such interested in the operation and maintenance of the elevator as a market for their wheat; that the notes were given to provide the elevator company with funds to continue in business; that the agent who solicited the notes stated that the indebtedness of the company was about $700, whereas it was many times that sum; that it was agreed that, if enough was not raised to clear up the indebtedness of the company, defendants' notes would be returned to them. The cash and notes raised, while not sufficient to pay the indebtedness of the elevator company, enabled it to resume operations and continue in business for three years, when it went into the hands of plaintiff as receiver. It is *held* that the evidence did not justify a finding that there was a want or failure of consideration for the notes.

—Galbraith v. Clark, 255.

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BOND.

OF FIDELITY INSURANCE.

See INSURANCE, 10, 11.

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BRIDGE. See HIGHWAY, 2; RAILWAY, 7.

VALIDITY OF CONTRACT BETWEEN TOWNS.

The contract was within the powers granted by G. S. 1894, §§ 1824-1827, to towns having a public highway on the line between them, and was valid. This is so notwithstanding that the bridge was on a part of the highway wholly within plaintiff town, that the town line was also the county line, and that the contract was silent as to its duration, and did not specify by whom the necessity for or extent of the repairs should be determined.

—Town of Mt. Pleasant v. Town of Florence, 359.

BROKER.

1. Plaintiff's employment being to procure a purchaser and not to negotiate a sale, it was not necessary to prove that the one procured by him was induced to buy because of plaintiff's efforts or representations.

—Matloch v. Jerabek, 128.

ACTION FOR COMPENSATION.

See SET-OFF AND COUNTERCLAIM, 2.

2. The evidence justified a recovery by a real estate agent for procuring, at defendant's request, a person to whom defendant effected a sale of his house and lot.

—Matloch v. Jerabek, 128.

3. There being no agreement as to compensation, it was proper to show the customary rate charged for such services as plaintiff rendered.

—Matloch v. Jerabek, 128.

BY-LAW.

AUTHORIZING ASSOCIATION TO TERMINATE RIGHTS OF MEMBERS.

See CONSTITUTION, 4.

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BY-LAW—Continued.

RESPECTING DIVISION OF PROFITS OF CO-OPERATIVE ASSOCIATION.

See CORPORATION, 6-9.

CARRIER.

CONSTRUCTION OF DISTANCE TARIFF (CASHMAN) ACT.

1. The Cashman Act (chapter 90, Laws 1913) does not apply to switching operations nor to movements from place to place within a city or district which constitutes a single shipping point. Traffic between Duluth station and the suburb of Fond du Lac in Duluth is *held* to be between places within a single shipping point, and to this traffic the act does not apply.
—Commercial Club of City of Duluth v. Northern Pacific Railway Co. 449.

2. Whether the traffic is handled by train crews or switching crews and whether on way bills or switching orders, are matters to be considered, but the manner of handling is not decisive. The fact that the railroad and the public have acquiesced in applying a switching tariff is important when that fact appears, as it does here. All these things are to be taken into account.
—Commercial Club of City of Duluth v. Northern Pacific Railway Co. 451.

TRANSPORTATION OF GRAIN.

CONSTRUCTION OF STATUTE.

3. Section 4491, G. S. 1913, providing that "every common carrier transporting grain shall give the shipper, on request, a receipt for the number of pounds of grain received from him, and shall deliver such quantity to the consignee * * * less loss from transportation, not to exceed sixty pounds to each car," construed as it must be with section 4492, which provides for a penalty for failure to deliver the proper quantity of grain, is *held* to be a penal provision only, and it does not in any manner affect the civil liability of the carrier. This civil liability remains as at common law, save as this may be modified by other provisions of statute.
—National Elevator Co. v. Great Northern Railway Co. 100.

4. Sections 4491, 4492, G. S. 1913, whether construed as regulating civil or criminal liability, or both, were not intended to allow a credit of 60 pounds on grain actually lost by the carrier.
—National Elevator Co. v. Great Northern Railway Co. 101.

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CARRIER—Continued.

TRANSPORTATION OF LIVE STOCK.

See DAMAGES, 3.

5. The verdict is not so clearly inadequate as to justify this court in setting it aside on that ground.
—McArdle v. Chicago, Milwaukee & St. Paul Railway Co. 379.

DAMAGES RECOVERABLE FOR INJURY TO LIVE STOCK.

See APPEAL AND ERROR, 23, 24.

TRANSPORTATION OF PASSENGERS.

6. Plaintiff claimed that while she was alighting from a street car standing on an up-grade, it lurched back and in consequence she suffered injury. *Held*: The question of the negligence of defendant was one for the jury under the evidence.
—Benoe v. Duluth Street Railway Co. 155.

7. Plaintiff claimed that while she was alighting from a street car, the motorman started the car, thereby causing her to fall and sustain injury. *Held*: The testimony made a case for the jury upon the question of negligence.
—Larson v. Wisconsin Railway, Light & Power Co. 159.

8. Plaintiff was injured while descending the steps of a street car. She claimed the heel of her shoe caught in the step. The steps of the car were of the usual construction, made of iron and steel, with perforations five-eighths of an inch across, not quite large enough to admit an ordinary penny. There is no question that this was a proper construction. A hole large enough to take in the heel of a shoe would be relatively much larger, noticeably larger. There is no substantial evidence that there was any such hole. The fact that the heel was torn from the shoe does not prove a defect in the step. *Held*: A verdict for plaintiff cannot be sustained.
—O'Leary v. St. Paul City Railway Co. 163, 164.

CASE. See CRIMINAL LAW, 8, 9.

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—Lennartz v. Montgomery, 172.

CASHMAN DISTANCE TARIFF ACT. See CARRIER, 1, 2.

CEMETERY.

EXEMPTION OF PUBLIC CEMETERY FROM TAXATION.

1. Public policy, from territorial times to the present day, has always favored the exemption of public burying grounds from taxes and assessments. The legislature must create the exemption; it cannot be done by the court.
—Diocese of St. Paul v. City of St. Paul, 71.

PRIVATE CEMETERY NOT EXEMPT FROM TAXATION.

2. Calvary Cemetery is owned and operated by the Diocese of St. Paul, a religious corporation. No plat of the property was ever filed for record as required by G. S. 1913, § 6316. The city of St. Paul levied a special assessment against the lands comprising the cemetery for the construction of a sewer along one side of the property. It is *held*: The diocese is not a public cemetery association, the statutes relative to the establishment of cemeteries by such associations, the conduct thereof, and the exemption of their lands from taxes and assessments, do not apply. The laws that do apply are those relative

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CEMETERY—Continued.

to the establishment of cemeteries by private persons and religious corporations. Under G. S. 1913, §§ 6316, 6317, and 6323, the lands comprising such a cemetery are not exempt from assessments for public improvements unless the requirements of the statute are substantially complied with. The omission to record a plat, as required by section 6316, was a substantial failure to comply with the statutory requirements, and prevents holding that the cemetery was laid out and dedicated as required by the statutes, and that the lands are exempt from assessments.

—Diocese of St. Paul v. City of St. Paul, 67.

CERTIORARI.

WILL NOT LIE.

See MUNICIPAL CORPORATION, 5.

CHATTEL MORTGAGE.

DELIVERY.

1. Upon dissolution of partnership by two lawyers, defendant gave plaintiff two notes, one for $1,500 due in one year, and one for $4,500 due in five years. Two chattel mortgages were executed at the same time. Defendant admitted the one securing the former note, but denied the one securing the $4,500 note, the one on which the action was brought. Defendant admitted his signature to the mortgage and declared his confidence in the integrity of the notary who took his acknowledgement and of the witnesses to his execution of the instrument. He testified he never consciously signed or acknowledged the execution. The court submitted the question of delivery to the jury. Verdict for defendant. There was another defense. *Held*: The evidence was insufficient to submit to the jury the question of delivery of the second chattel mortgage.

—Ward v. Allen, 1.

ACTION BY MORTGAGOR FOR CONVERSION OF UNMORTGAGED CHATTELS.

2. In an action by a chattel mortgagor against his mortgagee for the conversion of property acquired by him after the mortgage and placed with that mortgaged, and taken possession of by the mortgagee with that mortgaged, the evidence did not show that the mortgaged and unmortgaged property were so mingled and confused that it was error to refuse a peremptory instruction for the defendant under the doctrine that a mortgagor who mingles his other property with

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CHATTEL MORTGAGE—Continued.

that mortgaged so that a confusion of goods results cannot claim that not mortgaged unless he separates it from the other and that the mortgagee is not a wrongdoer in taking all of it.
—Aylmer v. Northwestern Mutual Investment Co. 148.

3. Nor did it require a peremptory instruction for the defendant because no demand was made nor was the evidence insufficient to sustain a finding of conversion.
—Aylmer v. Northwestern Mutual Investment Co. 148.

ACTION FOR LOSS OF ACCOUNTS.

4. A cause of action for damages for the loss of accounts alleged to have been caused by the defendant taking possession of the plaintiff's books of account is *held* unsustained.
—Aylmer v. Northwestern Mutual Investment Co. 148.

ACTION FOR LOSS ON CONTRACTS.

5. A cause of action for loss upon certain unfinished contracts alleged to have been caused by the defendant taking possession of the plaintiff's property is *held* unsustained.
—Aylmer v. Northwestern Mutual Investment Co. 148.

NOTICE OF SALE ON FORECLOSURE.

6. The failure to serve a copy of the notice of sale, in proceedings to foreclose a chattel mortgage, upon the person in the actual possession of the mortgaged property, as required by G. S. 1913, § 6974, renders the proceedings invalid.
—Jankowitz v. Kaplan, 452.

7. The objection to the failure to make such service is open to the mortgagor, though he may have sold the property prior to the date of the foreclosure proceedings.
—Jankowitz v. Kaplan, 452.

CONVERSION BY MORTGAGEE.

8. The mortgagee purchased the property at the foreclosure and thereafter sold a part thereof to a third person, receiving therefor an amount in excess of the mortgage debt. It is *held* that such sale was a conversion of the property, since the foreclosure was void, and in an action to recover a balance due on the mortgage debt the mortgagor may interpose the amount so received as a set-off.
—Jankowitz v. Kaplan, 452.

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CHATTEL MORTGAGE—Continued.

ACTION AGAINST MORTGAGOR.

9. It is not necessary in such case to prove the value of the property. Powell v. Gagnon, 52 Minn. 232, 53 N. W. 1148, distinguished. —Jankowitz v. Kaplan, 452.

CITY OF ST. PAUL. See CONSTITUTION, 3; EMINENT DOMAIN, 1-8; MUNICIPAL CORPORATION, 2-4, 6-8, 10, 11, 19.

ASSESSMENT FOR LOCAL IMPROVEMENT.

See CEMETERY, 2.

CITY OF MINNEAPOLIS. See MUNICIPAL CORPORATION, 5, 9, 20-23.

CITY OF VIRGINIA. See MUNICIPAL CORPORATION, 18.

CIVIL SERVICE. See MUNICIPAL CORPORATION, 5; OFFICER, 1, 3.

COLLATERAL ATTACK.

ON JUDGMENT.

See CORPORATION, 13, 14.

COMPROMISE AND SETTLEMENT.

Plaintiff had a judgment against defendant, who was ordered in supplementary proceedings to make disclosure of his property. He also held a note for $4,500 made by defendant, who was of doubtful financial responsibility. Defendant's evidence was such that the jury could have found a new contract was entered into upon adequate consideration which amounted to an accord and satisfaction, and that the contract had been partly performed, and defendant was ready, willing and able to perform it in full. If that is true, the old claims cannot be enforced. *Held*: The evidence on this branch of the case made a question for the jury, and plaintiff was not entitled to a directed verdict. —Ward v. Allen, 1, 4.

CONDITION.

IN LEASE.

See LANDLORD AND TENANT, 1-3, 5, 6.

CONSIDERATION. See GIFT, 1; MORTGAGE, 3; PLEADING, 3.

WANT OF CONSIDERATION.

See BILLS AND NOTES, 7.

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CONSTITUTION.

RESERVATION INDIANS ARE RESIDENTS OF THE STATE WITHIN ARTICLE 7 OF CONSTITUTION.

See INDIAN, 1.

ASSESSMENT OF DAMAGES AND BENEFITS.

1. In the award of damages and assessment of benefits where the improvement, when considered in connection with the property affected, is such that honest minds might differ, the apportionment thereof is a legislative function, and the courts will not interfere in the absence of a clear abuse of discretion.
—Sullwold v. City of St. Paul, 271.

VESTED RIGHT OF MUNICIPAL CORPORATION.

2. Chapter 152, Laws 1915, placed all telephone companies doing business in this state under the supervision and control of the Railroad and Warehouse Commission, and any telephone company, holding a franchise from a municipality at the time the law took effect, is permitted by section 15 thereof to surrender such franchise and receive, in lieu thereof, from the commission an indeterminate permit to occupy the streets of the municipality with its poles and wires. It is *held* that no private proprietary right, vested in the village of Litchfield by the franchise issued by its council in 1905, was impaired or affected by the written declaration of surrender tendered by relator to the village clerk for filing pursuant to said section 15.
—State ex rel. v. Holm, 281.

DUE PROCESS OF LAW.

See DRAIN, 2.

3. Section 243 of the charter of the city of St. Paul *held* not to be in conflict with the Fourteenth Amendment to the Federal Constitution.
—Sullwold v. City of St. Paul, 271.

TERMINATION OF MEMBERSHIP RIGHT.

4. Stevens v. Minneapolis F. D. Relief Assn. 124 Minn. 381, 145 N. W. 35, construing a by-law substantially like that involved in this action, by which the managing officers of the association were empowered to terminate the rights of members therein without notice or opportunity to be heard, followed and applied.
—Burmaster v. Alwin, 383.

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CONTRACT.

IMPLIED CONTRACT.

See GRAND JURY, 1.

CONSIDERATION.

See GIFT, 1; MORTGAGE, 3.

WANT OF CONSIDERATION — EVIDENCE.

See BILLS AND NOTES, 7.

1. Under the facts developed at the trial the defense of want of consideration for the contract involved in the action was not made out.
—Flick v. Ellis-Hall Co. 364.

QUALITY OF WELL WATER.

2. Where a farmer, desiring water for farm use, hires a well-driller to drill a well in a particular place, there is no implied warranty by the well-driller of the quality of the water which may be obtained.
—Skalsky v. Johnson, 275.

RELEASE OF SURETY ON BUILDING CONTRACT.

3. Where a building contract authorizes the owner to make changes in the work to be performed thereunder, and provides that the increase or decrease in the cost resulting therefrom shall be added to or deducted from the contract price, and that any agreement for changes made in writing shall not affect the liability of the sureties, the contractor, by making the desired changes and receiving full payment therefor without having the agreement for the changes reduced to writing, waives that formality, and as such waiver does not affect the contract of his sureties in matter of substance they are not released thereby, in the absence of an express stipulation to that effect.
—Milavetz v. Oberg, 215.

RESCISSION.

See CORPORATION, 12; LIMITATION OF ACTION, 3.

4. To entitle a party to a contract to rescind the same for fraud and recover back what he paid, it is not necessary that he plead or prove that he was damaged in any particular amount or suffered any real injury.
—Fawkes v. Knapp, 384.

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CONTRACT—Continued.

PART PERFORMANCE.

See COMPROMISE AND SETTLEMENT.

PERFORMANCE,

See GIFT, 1; PRINCIPAL AND SURETY, 4.

BREACH.

OPTION AS TO TIME OF BRINGING SUIT.

See WILL, 2.

ACTION FOR BREACH — DEFENSE OF FRAUD.

5. The general allegation of fraudulent representations inducing the contract was not sufficient to admit the defense, since the false or fraudulent representations were not set out, nor was there an offer of proof so as to enable the court to determine whether any such representations constituted a defense.
—Flick v. Ellis-Hall Co. 365.

ACTION FOR BREACH OF LANDLORD'S COVENANT TO HEAT PREMISES.

See DEATH BY WRONGFUL ACT.

CO-OPERATIVE ASSOCIATION. See CORPORATION, 1, 6-9.

CORPORATION.

WHERE POLICY OF FIRE INSURANCE WAS ISSUED IN NAME OF PARTNERS INSTEAD OF CORPORATION.

See INSURANCE, 17.

STATEMENT OF OPINION AS TO VALUE OF BONDS NOT ACTIONABLE.

See FRAUD, 1.

CO-OPERATIVE ASSOCIATION.

1. A co-operative association has been defined to be a "union of individuals, commonly laborers or small capitalists, formed * * * for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each."
—Mooney v. Farmers Mercantile & Elevator Co. 201.

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CORPORATION—Continued.

RIGHT OF PROMOTER.

2. A promoter of a banking corporation having been repaid all the advancements and expenditures made by him, is not entitled to retain any part of the lot purchased for the bank, nor the proceeds of that part of the lot which by agreement among the promoters was sold, after such purchase, to reduce the amount which the bank would be called upon to pay.

—Lake Harriet State Bank of Minneapolis v. Venie, 339.

3. He conveyed the legal title to a part of the lot to defendant, Harriet Loan & Realty Company, but, as that company stands in his shoes, plaintiff is entitled to a conveyance thereof.

—Lake Harriet State Bank of Minneapolis v. Venie, 339.

4. A note having been executed to the promoter by the Realty Company without consideration, and he, while president of the bank and without other authority, having placed this note, unindorsed, among the assets of the bank and withdrawn the amount thereof from the funds of the bank, the bank had the right to repudiate the transaction and recover from him the amount so withdrawn.

—Lake Harriet State Bank of Minneapolis v. Venie, 339.

AUTHORITY OF OFFICER.

5. In settling his account for expenditures, the promoter could not represent both himself and the bank; and the bank is entitled to recover the excess above the amount expended which, as president of the bank, he had caused to be credited to himself on account of such expenditures, and subsequently withdrew from the funds of the bank.

—Lake Harriet State Bank of Minneapolis v. Venie, 339.

BY-LAW OF CO-OPERATIVE ASSOCIATION—DIVISION OF PROFITS.

6. A co-operative association organized under section 6485, G. S. 1913, is authorized by the statute to provide by by-law for the distribution of profits and earnings in such proportion as the stockholders may deem just.

—Mooney v. Farmers Mercantile & Elevator Co. 199.

7. It was clearly competent for the legislature to commit the subject of the distribution of earnings of co-operative associations to the judgment

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CORPORATION—Continued.

and discretion of the stockholders. G. S. 1894, § 2912; G. S. 1913, § 6485. And a by-law enacted in pursuance of such authority, which is not unfair or unreasonable, cannot well be challenged as violating the rights of nonassenting stockholders. This by-law was enacted at an adjourned annual meeting, at a time when it was proper to do so. Plaintiff was present at the annual meeting, and it is not important that he was not subsequently notified of the date to which the meeting adjourned. The by-laws do not require such notice.
—Mooney v. Farmers Mercantile & Elevator Co. 202.

SAME — DISCRIMINATION BETWEEN CLASSES OF STOCKHOLDERS.

8. A by-law which discriminates within reasonable limits between stockholders who deal with the company, thereby increasing its earning power, and those who do not deal with it, *held* not violative of the rights of the stockholder thus discriminated against.
—Mooney v. Farmers Mercantile & Elevator Co. 199.

9. For several years the company made an equal pro rata distribution of its profits without discrimination. It is *held*, that the custom in this respect, though extending over several years, did not preclude the company from departing therefrom, or deprive it of the right to enact a by-law providing for a different distribution. No right of the nonassenting stockholders was thereby violated.
—Mooney v. Farmers Mercantile & Elevator Co. 199.

SALE OF STOCK.

10. Action to recover amount paid for 100 shares of stock in a corporation, organized to manufacture and sell an electric starter for automobiles, of which defendant was president, treasurer and manager, because the stock sold was the property of defendant and not treasury stock of the corporation. Plaintiff testified that he visited the factory and investigated the device; that defendant told him the corporation was going to sell $15,000 worth of treasury stock in order to raise money for machinery and to get started in business, and he would allow plaintiff the amount of his commission on the sale. It was admitted the stock sold belonged to defendant and the proceeds of the sale never went into the treasury of the corporation. *Held*: The jury was justified in finding (1) that defendant induced plaintiff to believe he was buying treasury stock and that his money would go to help the corporation pay for machinery; and (2) that whether plaintiff got treasury stock for his money or stock owned

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CORPORATION—Continued.

by defendant, was a matter of material importance to him and justified giving credence to his statement that he would not have purchased had he known he was buying defendant's stock.

—Fawkes v. Knapp, 386, 387.

RESCISSION OF CONTRACT.

11. The tender and demand made were sufficient under the circumstances to entitle plaintiff to maintain the action.

—Fawkes v. Knapp, 385.

12. The evidence sustains the verdict of the jury finding that the fraudulent representations were made, that they were material, that the plaintiff relied thereon and was induced thereby to enter into the contract, and that he rescinded promptly on learning of the fraud.

—Fawkes v. Knapp, 385.

ENFORCEMENT OF LIABILITY OF STOCKHOLDERS.

13. In a sequestration proceeding having as one object the enforcement of stock liability, the stockholders may by answer assail for fraud or collusion the judgment for the plaintiff against the defendant upon which the proceeding rests.

—Greenfield v. Minnesota Mining & Development Co. 446.

14. The answer of a stockholder alleged in very general terms that plaintiff was the vice president and principal stockholder, that he advanced defendant corporation large sums of money, taking its notes at usurious rates and requiring it to turn over large amounts of stock as a consideration for making the loan, and a general allegation that the judgment on such loans was entered by default and through the fraud and collusion of the directors and officers. No specific facts were stated. *Held*: The answer did not allege fraud and collusion sufficiently.

—Greenfield v. Minnesota Mining & Development Co. 446, 448.

LIABILITY OF DIRECTORS.

15. It is the duty of the directors of a corporation to use the authority given them solely for the benefit of the corporation and its stockholders, and to exercise ordinary business care and diligence to see that its property is not wasted nor taken from it upon unfound-

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CORPORATION—Continued.

ed claims. The law does not permit them to appropriate such property to themselves nor give it to others; and if they waste it, or apply it to the payment of claims which they have no authority to pay, or by negligent inattention to their duties suffer others to appropriate it without right, they are liable to the corporation for any losses resulting from such misuse of authority or neglect of duty.

—Lake Harriet State Bank of Minneapolis v. Venie, 346, 347.

16. The individual defendants having violated their duty as directors by authorizing Venie to appropriate to himself funds of the bank to which they knew or ought to have known that he was not entitled, and such funds having become lost to the bank, they are liable therefor.

—Lake Harriet State Bank of Minneapolis v. Venie, 340.

17. The findings to the effect that plaintiff's bank building had been erected and the site therefor purchased by defendant F. J. Venie, pursuant to agreements between himself and the other promoters that he should make such purchase and erect such building and be repaid the actual cost thereof, and that such agreements had been ratified after the incorporation of plaintiff, are sustained by the evidence.

—Lake Harriet State Bank of Minneapolis v. Venie, 339.

EXAMINATION OF CLAIM IN RECEIVERSHIP.

18. In an application by a receiver of an insolvent corporation to present for allowance a claim against another insolvent corporation, also in the hands of a receiver, made after the expiration of the time limited for the presentation of claims against it, the court properly considered the merits of the claim sought to be presented especially since the same could be determined from an inspection of written contracts not in dispute, so that there was no occasion to pass upon conflicting affidavits.

—Standard Lithographing & Printing Co. v. Twin City Motor Speedway Co. 294.

19. While, perhaps, the court was not justified in finding that the receiver who made the application had not personally used due diligence in the matter, the showing suggests a situation where the

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CORPORATION—Continued.

creditors and the stockholders of his insolvent, because of lack of diligence or want of right, are not in position to assert the claim sought to be presented.
—Standard Lithographing & Printing Co. v. Twin City Motor Speedway Co. 294.

20. The order denying the application is a discretionary order, and no abuse of judicial discretion is made to appear.
—Standard Lithographing & Printing Co. v. Twin City Motor Speedway Co. 294.

MERITS OF CLAIM NOT CONSIDERED ON AFFIDAVITS.

21. In applications to remove a default, the merits of the claim or defense presented should not be determined upon conflicting affidavits.
—Standard Lithographing & Printing Co. v. Twin City Motor Speedway Co. 295, 297.

FOREIGN CORPORATION DOING BUSINESS IN MINNESOTA.

See BILLS AND NOTES, 2.

COSTS. See HUSBAND AND WIFE, 5.

TAXATION OF DISBURSEMENTS.

The expense for making a plat and for taking X-ray photographs cannot be included in the taxation of costs and disbursements against the losing party.
—Martin v. Minneapolis & St. Louis Railroad Co. 40.

COUNTY AND COUNTY OFFICER.

COUNTY A PARTY TO JUDICIAL DITCH PROCEEDING.

See DRAIN, 3.

VALIDITY OF CONTRACT BETWEEN TOWNS IN DIFFERENT COUNTIES.

See BRIDGE.

COMPENSATION OF ENGINEER ON JUDICIAL DITCH.

See DRAIN, 2.

AUDITING CLAIM AGAINST COUNTY.

See DRAIN, 2.

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COUNTY AND COUNTY OFFICER—Continued.

COUNTY AUDITOR.

RECEIPT OF REAL ESTATE ASSESSMENT BOOK.

See TAXATION, 2.

COURT.

PROBATE COURT.

See APPEAL AND ERROR, 28.

AMENDMENT OF DECREE OF DISTRIBUTION.

See EXECUTOR AND ADMINISTRATOR, 7-9.

CRIMINAL LAW.

VENUE.

1. A person who receives into his possession at his place of residence or business contraband game in violation of the laws of the state, and at that place ships the same to a purchaser at a distant point in the state, commits a crime in so doing, subjecting himself to prosecution in the county wherein such shipment was so made.
   —State v. Giller, 370.
2. He is not subject to prosecution in a county through which the shipment may pass en route to destination on the theory that he was in constructive possession of the contraband articles in such county, where he does not accompany the shipment.
   —State v. Giller, 370.
3. General Statutes 1913, § 4765, defining the word "possession" as used in the regulatory game statutes, was not intended as fixing the venue in prosecutions for a violation of the statute, nor to change the place of trial as fixed by section 9196.
   —State v. Giller, 370.
4. If section 4765 was applicable to fixing the venue of such prosecution, it would necessarily follow that a game warden would have it in his power to fix and determine the venue or place of prosecution in such cases, by seizing the unlawful shipment and instituting a prosecution in a county through which it might pass most suited to his convenience. The situation might be somewhat different, if the owner accompanied the shipment.
   —State v. Giller, 373.

HEARING BEFORE COMMITTING MAGISTRATE.

5. Evidence of complaining witness was reduced to writing. On the hearing before the magistrate she refused to testify as to the facts,

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CRIMINAL LAW—Continued.

but did testify that the facts contained in the written statement were true. *Held*: That while the evidence might not be sufficient to support a conviction, it warranted the magistrate in finding that a crime had been committed and there was probable cause for holding defendant to the grand jury.

—State ex rel. v. Julius, 469.

WHEN SENTENCE IS VOID.

6. Where the law requires a sentence to be for a definite term, a sentence from which the length of the term cannot be ascertained is void.

—State ex rel. v. Reed, 465.

7. A sentence for murder in the third degree to "imprisonment at hard labor in the state prison at Stillwater, Minnesota, according to law," when the statute required for such a crime a definite term of "not less than seven years nor more than thirty years," is void.

—State ex rel. v. Reed, 465.

WHEN SENTENCE EXCEEDS THE PENALTY, THE PRISONER MUST SERVE OUT THE PENALTY.

See HABEAS CORPUS, 2.

WHEN CONVICTION VALID AND SENTENCE VOID, NO DISCHARGE OF PRISONER ON HABEAS CORPUS.

See HABEAS CORPUS, 1.

WHEN APPEAL CANNOT BE TAKEN.

8. An order denying a motion to settle a case is not appealable, nor is it reviewable on appeal from the order denying a new trial. Mandamus is the remedy.

—State v. Atanosoff, 321.

REVIEW ON APPEAL.

9. In the absence of a certification under the statute, or a case or bill of exceptions, a ruling on a challenge to the grand jury cannot be reviewed; nor without a case or bill of exceptions can rulings at the trial nor the sufficiency of the evidence be considered.

—State v. Atanosoff, 321.

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CRIMINAL LAW—Continued.

LIABILITY OF CARRIER FOR LOSS OF GRAIN IN TRANSPORTATION.

See CARRIER, 3, 4.

HOMICIDE.

10. General Statutes 1913, § 8610, makes the procurement of a miscarriage resulting in death, manslaughter, "unless the same is necessary to preserve * * * life." In order to bring a case within the exception it is not necessary that the danger of death be immediate.
—State v. Hatch, 317.

SAME—CHARGE TO JURY.

11. An instruction that to bring a case within the exception the danger of death must be immediate is not, however, erroneous, where the defense is predicated on the existence of immediate danger to life.
—State v. Hatch, 317.

12. A statement in a charge to the jury, that the testimony is squarely in conflict and that some of the witnesses have committed perjury, but that it is for the jury to say who is to be believed, is not an erroneous charge.
—State v. Hatch, 317.

RAPE.

13. Evidence considered, and *held* sufficient to sustain a conviction of assault with intent to commit rape.
—State v. Krantz, 114.

14. It is competent, in a prosecution for assault with intent to commit rape, to give in evidence a declaration of the fact made to her close friend at the first opportunity and shortly after the transaction, in corroboration of the testimony of the complaining witness.
—State v. Krantz, 114.

15. If a man assaults a woman with intent to have intercourse with her by force and against her will, the crime of assault with intent to commit rape is complete.
—State v. Krantz, 115.

16. The use of force in an endeavor to have carnal knowledge of a woman, tends to show an intent to commit rape, and if the evidence satisfies the jury that the defendant used such force and so con-

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CRIMINAL LAW—Continued.

ducted himself as to evince an intention to commit rape, it is sufficient to sustain a conviction of an assault with an intent to commit rape.

—State v. Krantz, 115.

CUSTOM. See BROKER, 3.

DAMAGES.

IN ACTION FOR DEATH—NOT EXCESSIVE.

1. Action against saloonkeepers, who sold intoxicating liquor to plaintiff's husband, for his death caused by intoxication. Verdict for $3,000. Decedent was 28 years of age, in good health, capable of earning good wages. *Held*: The verdict was not excessive.

—Fest v. Olson, 32, 34.

IN ACTION FOR EXPULSION FROM MEMBERSHIP—NOT EXCESSIVE.

2. Verdict for $1,000, reduced by trial court to $500. No evidence of actual damage but evidence from which malice might be found. Verdict sustained.

—Burmaster v. Alwin, 384.

IN ACTION FOR INJURY TO LIVE STOCK—INADEQUATE DAMAGES.

3. Action for loss caused when defendant failed to run a stock train between Saturday and Monday, because of drop in market price and shrinkage in weight caused by exposure of animals during the delay. Verdict for $50. *Held* not so inadequate as to justify the court in setting it aside on that ground.

—McArdle v. Chicago, Milwaukee & St. Paul Railway Co. 379.

IN ACTION FOR PERSONAL INJURY—TOO REMOTE.

4. This being an action to recover damages for injuries to the person of plaintiff, caused by the alleged negligence of the defendant, *held*, that the expense of a trip to California, under the evidence in this case, cannot be considered such damage as is the natural and proximate consequence of the wrongful act, and is too remote.

—Benoe v. Duluth Street Railway Co. 155.

SAME—NOT EXCESSIVE.

5. Verdict for $300. The physician testified the injury was permanent. Plaintiff's wife was unable to attend to her duties for several months and plaintiff cared for her in person. There was no evidence as to a money outlay. *Held*: The verdict was not excessive.

—Schmitt v. City of Minneapolis, 474.

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DAMAGES—Continued.

6. Verdict for $1,500. Evidence that plaintiff's lower jaw was broken in two places, necessitating painful surgical treatment. The hospital expenses and physician's services amounted to over $200. *Held*: The verdict was not excessive.
—Notaro v. Mandel, 424.

7. Verdict for $3,037, reduced by trial court to $2,060. Evidence that plaintiff was 29 years old and worked in her mother's hair dressing shop; that her right ankle was dislocated; that she was confined to bed for 4 weeks and to her chair for 9 weeks; that she cannot stand on her foot to work since the injury; that she probably would never recover completely. *Held*: The verdict as reduced by the trial court was not excessive.
—Larson v. Wisconsin Railway, Light & Power Co. 159, 161.

8. Verdict for $2,500. Evidence of fracture of the thigh bone and permanent shortening of plaintiff's leg. *Held*: The damages are not excessive.
—Thoorsell v. City of Virginia, 56, 59.

9. Verdict for $2,500. Plaintiff's left ankle was injured. She suffered considerable pain. Her physician gave it as his opinion that the joint would never perform normal service. While the award is liberal, under the rule in reviewing verdicts the court cannot say it is excessive.
—Schmitt v. City of Minneapolis, 193.

10. Verdict for $6,000. Reduction by trial court to $4,500. Evidence of plaintiff's permanent disability to pursue his former calling at which he could earn $100 to $150 per month. *Held*: The verdict, as reduced, though seemingly large, should not be disturbed by this court.
—Otto v. Duluth Street Railway Co. 312.

11. Action for personal injury. Verdict for $11,500. *Held*: While the evidence, mostly from expert medical witnesses, and based largely upon X-ray photographs, was flatly contradictory, if true, it presented a question for the jury and fully supported the verdict.
—Chapko v. Chicago, Burlington & Quincy Railroad Co. 470.

12. Verdict for $12,750. Plaintiff had been a successful teacher for some years. She had taught oratory and dramatic art and fitted herself to give public readings. She was about to engage in giving such readings as a profession. Evidence that she had sustained a frac-

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DAMAGES—Continued.

ture at the base of the skull and a permanent injury to the brain. Experts of high standing testified the injury to her brain would permanently impair her ability to follow her chosen profession. *Held*: The amount of the verdict having been approved by the trial court, the supreme court will not interfere with it.
—Theisen v. Durst, 355.

SAME—EXCESSIVE.

13. Verdict for $12,500. Plaintiff was 29 years of age and was earning $30 per month. She was in the hospital 17 weeks and in bed at home 4 weeks more. After that time she was able to get about on crutches. She sustained a spiral fracture of the upper end of the femur near the hip. One leg is 1¼ inches shorter than the other and she will limp through life. She suffered much pain, but is not incapacitated from earning her living at her accustomed work. *Held*: The verdict is too large. Affirmed on condition plaintiff consents to a reduction of the verdict to $10,000.
—Powers v. Wilson, 409.

IN CLAIM FOR WORK AND LABOR—NOT EXCESSIVE.

14. Claim against estate of his father for services rendered to him by his son. Disallowed in probate court, but on appeal to district court verdict for $5,088. *Held*: The verdict is not excessive.
—Wagner v. Seaberg, 37.

SAME—EXCESSIVE.

15. Claim against estate of her father for services rendered to him by his daughter. Allowance of $3,000. On appeal to district court verdict for $5,241. *Held* excessive by the supreme court, and new trial granted unless claimant consented to a reduction by $1,500.
—Lovell v. Beedle, 13.

DEATH. See CRIMINAL LAW, 10, 11; WORKMEN'S COMPENSATION ACT, 20.

PRESUMPTION THAT IT WAS NOT SELF-INFLICTED.

See WORKMEN'S COMPENSATION ACT, 19.

DEATH BY WRONGFUL ACT.

The complaint alleged negligence in the performance by a landlord of his contract with a tenant to keep the leased premises heated, causing the death of the tenant. Though the action is based on

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DEATH BY WRONGFUL ACT—Continued.

the contract and is therefore an action on contract, it is *held* that the complaint states a cause of action to recover damages for the tenant's death as caused by the wrongful acts and omissions of defendants.

—Keiper v. Anderson, 392.

DEED.

Authority to fill a blank in a sealed instrument may be by parol and may be implied. When the grantee's name is filled with authority the deed is effective. This is the rule in Minnesota, and was the rule before seals were abolished. G. S. 1913, § 5704. When the blank is filled pursuant to actual authority, the deed is effective and it is unnecessary to invoke an estoppel.

—Schauble v. Redding, 190, 191.

DESCRIPTION. See MECHANIC'S LIEN, 1.

DETECTIVE.

CONTRACT OF EMPLOYMENT.

That a grand jury received reports concerning crime conditions in the county from plaintiff, a detective agency, or heard the testimony of its detectives, or that some of its members made partial payments for the services it rendered, does not tend to establish a contract of employment between the plaintiff and the members of the grand jury personally; for such a contract, even if not void as against public policy, would be so at variance with the usual and fair procedure under the law that it ought not to be allowed to rest on inferences.

—William J. Burns International Detective Agency v. Holt, 165.

DISCRETION OF COURT.

See APPEAL AND ERROR, 15; CONSTITUTION, 1; CORPORATION, 20; EMINENT DOMAIN, 7; JUDGMENT, 1, 4; NEW TRIAL, 2; PLEADING, 4; WITNESS, 3 ,4.

DISCRIMINATION. See CORPORATION, 8.

DISMISSAL OF ACTION. See BAILMENT, 2.

DIVORCE.

FATHER LIABLE FOR SUPPORT OF HIS MINOR CHILDREN AFTER DIVORCE.

See PARENT AND CHILD, 2.

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DRAIN. See NEGLIGENCE, 5.

APPOINTMENT OF REFEREE ON JUDICIAL DITCHES INVALID.

1. An order, made by a judge of the district court, appointing a referee on all judicial ditches then pending or that might thereafter be instituted in such judicial district, is unauthorized by section 5571, G. S. 1913.

—State ex rel. v. O'Brien, 185.

JUDICIAL DITCH ACT.

2. The legislature intended, by the provisions of G. S. 1913, § 5571, and the judicial ditch law as a whole, to make the county or counties in which a judicial ditch is proposed to be constructed primarily liable for the compensation and expenses of the engineer appointed by the court and of others who perform services in the proceeding, whether the ditch is established or the proceedings dismissed. Assuming, without deciding, that this would violate no constitutional provision, if the law provided for notice to the county, and a right and opportunity to be heard on the application to the court to allow, audit, and order paid such compensation and expenses, if it does not so provide, there is not due process of law. The provision in section 5571 that in case of a judicial ditch all "fees, per diem compensation and expenses * * * shall be audited, allowed and paid upon the order of the judge of the district court having charge thereof," provides for no notice to the county, no right or opportunity to be heard, nor does any other provision of the law. This provision is unconstitutional, as not due process of law, and an order made thereunder is void.

—State ex rel. v. District Court of Thirteenth Judicial District, 204.

3. The county is as much a party to the proceedings as are the landowners whose property it is proposed to assess. G. S. 1913, §§ 5553, 5555, 5556.

—State ex rel. v. District Court of Thirteenth Judicial District, 207.

DYNAMITE.

NEGLIGENCE OF LANDLORD.

See EXPLOSIVE.

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ELECTION. See EVIDENCE, 2.

RIGHT TO VOTE.

1. It is not thinkable that, when care was taken to exclude certain persons (like Indians not taxable by law) from the count when a district's representation in the legislature is to be determined, it nevertheless was intended that the persons so excluded should participate in the election of the representation so fixed. It is an indication that the persons excluded from being counted as a part of the population of the district are also to be excluded from participating either as voters or as candidates at election.
—Opsahl v. Johnson, 49.

RIGHT OF NONCITIZEN MIXED BLOOD INDIAN TO VOTE.

See INDIAN, 3.

CONTEST—BURDEN OF PROOF.

2. At an election held in Beltrami county to determine whether the sale of intoxicating liquors should be prohibited, 58 mixed and full blood Indians, of the Red Lake band of Chippewas, inhabitants of the Red Lake reservation, voted. Of these 6 were full citizens having received allotments under the Dawes and Nelson Acts. The others had applied for allotments, but no action had been taken by the government. If these 52 mixed and full blood Indians, who were not allottees, had not voted, concededly the result would have been in favor of prohibiting the sale of intoxicating liquors. The trial court found that the mixed bloods, comprising at least 46 of the 52, had adopted the habits and customs of civilization, and because thereof were qualified voters. It is *held*:

The contestant went so far in sustaining the burden of proof on the proposition of noncitizenship of the 52, as a class, that if any exception existed among them it was for contestees to point out.
—Opsahl v. Johnson, 42.

EMINENT DOMAIN.

AUTHORITY OF CITY OF ST. PAUL.

1. Under the charter of the city of St. Paul, the council may condemn and take land and structures thereon, or as much thereof as may be necessary for the purposes of the improvement.
—Sullwold v. City of St. Paul, 271.

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EMINENT DOMAIN—Continued.

WHEN PROPERTY IS DEVOTED TO PUBLIC USE.

2. The rule that property already devoted to one public use cannot be taken for another public use without express authority therefor does not apply to property which has not actually been put to the prior use and is not shown to be actually and presently needed therefor. The property in controversy has not been actually put to a public use and is not shown to be needed therefor.
—Board of Water Commissioners v. Roselawn Cemetery, 459.

EXERCISE OF RIGHT BY WATER COMMISSIONERS OF ST. PAUL.

3. The board of water commissioners of the city of St. Paul is a mere agency of the city, and its authority to exercise the power of eminent domain is derived from the charter of the city and must be exercised as provided in such charter.
—Board of Water Commissioners v. Roselawn Cemetery, 459.

VALUATION FOR FIXING DAMAGES.

4. It does not appear from the record that the court adopted an incorrect basis of value in fixing the amount of appellant's damages.
—Board of Water Commissioners v. Roselawn Cemetery, 459.

NOTICE OF TRIAL OF APPEAL UNNECESSARY.

5. The charter requirement that the appeal be placed upon the calendar for the succeeding term of court was sufficient authority for placing it thereon without a notice of trial.
—Board of Water Commissioneers v. Roselawn Cemetery, 458.

APPEAL FROM AWARD OF COMMISSIONERS—REVIEW.

6. The appeal from the award of the commissioners is limited to the question of damages and raises no question as to the regularity or sufficiency of the proceedings. But if power to take the property be lacking, power to award damages is also lacking, and appellant is not debarred from raising the question that taking the property in controversy is beyond the power conferred by the charter.
—Board of Water Commissioners v. Roselawn Cemetery, 459.

ASSESSMENT OF DAMAGES BY JURY.

7. The owner of property taken under the power of eminent domain conferred by the charter of the city of St. Paul is not entitled as a

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EMINENT DOMAIN—Continued.

matter of right to have his damages assessed by a jury; and upon an appeal to the district court he is not entitled to a jury trial unless the court grants it in the exercise of its discretion.

—Board of Water Commissioners v. Roselawn Cemetery, 459.

RECOVERY OF TENANT'S PROPORTION OF DAMAGES.

8. In condemnation proceedings for widening a street plaintiff, having a lease of a portion of the part condemned, presented a claim for damages to the board of public works. The board in terms neither allowed nor disallowed the claim, nor awarded any sum for leases, but awarded a lump sum to the owners. Defendant received the money, after deducting the benefits, from the city. In an action to recover plaintiff's proportion, the court *held* the evidence was sufficient to justify submitting the case to the jury.

—Kafka v. Davidson, 301.

EQUITY. See HUSBAND AND WIFE, 1.

ESTOPPEL. See APPEAL AND ERROR, 3; DEED; JUDGMENT, 8-10; PRINCIPAL AND AGENT, 5; SALE, 4.

AGAINST PRINCIPAL FOR ACTS OF AGENT WITHIN HIS APPARENT AUTHORITY.

See PRINCIPAL AND AGENT, 4.

AGAINST BENEFICIARY IN INSURANCE POLICY.

See INSURANCE, 26.

AGAINST CREDITORS AND STOCKHOLDERS OF INSOLVENT CORPORATION.

See CORPORATION, 19.

BY LEASE.

Defendant is not estopped by a writing in the form of a lease when his explanation of it is corroborated by evidence of declarations of decedent subsequent to its date, and the explanation is satisfactory to the jury.

—Drager v. Seegert, 9.

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EVIDENCE.

Of Location of Defect on Railway Bridge.

See Railway, 8.

Of Value of Mortgaged Chattels.

See Chattel Mortgage, 9.

Postmark on Envelope of Letter Evidence of Time of Mailing.

See Judgment, 2.

Exclusion of Testimony of Intent to Return to Homestead.

See Homestead, 3.

Judicial Notice.

1. It is common knowledge that persons in the rear seat of an automobile are in better position to hear the approach of other vehicles than those in the front seat, owing to the fact that they are further removed from the noise of the automobile engine.
—Christison v. St. Paul City Railway Co. 457.

2. The supreme court doubts whether it has been so general a practice in Minnesota to vote reservation Indians that it can take judicial notice thereof. The record in this case is not convincing that such practice prevails.
—Opsahl v. Johnson, 47.

Presumption.

See Railway, 2; Workmen's Compensation Act, 19.

Burden of Proof.

See Bailment, 1; Election, 2; Vendor and Purchaser.

Best and Secondary Evidence.

3. It was not error for the trial court to allow an amendment of the complaint at the trial; nor to permit the cashier of a bank having personal knowledge of the fact to testify that a depositor had checked out the entire amount to his credit; nor to exclude exhibits offered solely for the purpose of contradicting a witness upon an immaterial point.
—Finseth v. Scherer, 356.

Declaration of Complainant.

See Criminal Law, 14.

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EVIDENCE—Continued.

DOCUMENTARY.

BOOKS OF ACCOUNT.

See INSURANCE, 30.

4. Books of account of plaintiff, kept by the person in charge of his business, having every appearance of complete books of account, produced after testimony by plaintiff that he had books of account of the business and in response to a request to produce his books of account, exhibited by him on other occasions as the books in which his records were kept, were sufficiently identified to be competent evidence against plaintiff.
—Vath v. Wiechmann, 87.

EXHIBITS OFFERED TO CONTRADICT WITNESS.

See EVIDENCE, 3.

TRANSCRIPT OF PROCEEDINGS IN A FOREIGN COURT.

See ATTORNEY AND CLIENT, 1.

PAROL EVIDENCE TO VARY WRITING.

5. Action on promissory note against maker and indorser. Defendant indorser offered evidence of a verbal agreement that he was not to become personally liable on his indorsement and that the president of plaintiff bank at the time of the indorsement agreed to stamp over his endorsement the words "without recourse." This was not done. *Held*: The evidence was inadmissible as its only effect was to vary the contract.
—Lake Harriet State Bank of Minneapolis v. Miller, 481.

HYPOTHETICAL QUESTION.

6. A hypothetical question calling for an opinion on facts testified to by another witness may exclude the opinion given by such other witness.
—Nardinger v. Ladies of the Maccabees of the World, 16.

EXCHANGE OF PROPERTY.

PRINCIPAL BOUND BY ACTS OF AGENT.

See PRINCIPAL AND AGENT, 4.

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EXECUTION.

SUPPLEMENTARY PROCEEDINGS.

See COMPROMISE AND SETTLEMENT.

INJUNCTION.

Action to restrain enforcement of money judgment. Personal service of summons. Time had expired within which court could grant relief from default. Complaint did not deny the fact of personal service, but alleged that defendants had no recollection of it and, if it was so made, by inadvertence and without intentional neglect these plaintiffs either assumed that the summons referred to other matters or overlooked it. *Held*, as against a demurrer, the complaint was bad.

—Erlitz v. Barclay, 480.

EXECUTOR AND ADMINISTRATOR.

COST OF TOMBSTONE AN EXPENSE OF ADMINISTATION.

1. The expenditure by an executor, with the approval of the probate court, of a reasonable sum to provide a suitable tombstone upon the grave of the deceased, is an expense of administration of the estate, and the amount so expended is not subject to an inheritance tax under G. S. 1913, § 2271.

—State ex rel. v. Probate Court of St. Louis County, 107.

COMPENSATION FOR CHILD'S SERVICES.

2. A child remaining a member of the family after becoming of age, is not entitled to pay for his services, unless they were performed pursuant to a prior agreement for compensation therefor; but such an agreement may be established by proof of facts and circumstances from which it may fairly be inferred.

—Lovell v. Beedle, 12.

3. The evidence made a question for the jury as to whether the services in question were rendered pursuant to such an agreement.

—Lovell v. Beedle, 13.

4. The evidence was sufficient to justify the jury in finding that services rendered by a son to his father after he became of age were not rendered gratuitously, but pursuant to an agreement that they should be paid for at the death of the father.

—Wagner v. Seaberg, 37.

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EXECUTOR AND ADMINISTRATOR—Continued.

5. Where there was an understanding that a son, who had remained at home, cared for his father, and worked the farm after he became of age, should be paid for his services by receiving the farm as his own at his father's death, and the father neglected to give the farm to his son by deed or will, the latter was not obliged to sue for specific performance, but might file a claim against the estate for the reasonable value of his services.
—Wagner v. Seaberg, 39.

DECREE OF DISTRIBUTION.

6. A decree of distribution made by a probate court is a decree in rem and binds infants and parties not in being.
—Savela v. Erickson, 98.

AMENDMENT OF DECREE OF DISTRIBUTION.

7. If a probate decree is deliberately entered into as a result of a judicial construction of the will, with no fraud and no mistake other than an erroneous construction of the will, the power of the court to amend such a decree is exhausted upon the expiration of the time to appeal therefrom.
—Savela v. Erickson, 98.

8. If the decree was obtained by fraud or was the result of a mistake of fact, relief may be had in equity and it is fairly inferable from the cases that a decree may be amended in the probate court on the same grounds.
—Savela v. Erickson, 98.

9. The probate court made a decree vesting in certain named persons a remainder left by will to "the grandchildren" of the testator. One grandchild had been born after the death of the testator and before the decree. Of this fact the court had no knowledge. Another was born after the decree but before the estate vested in enjoyment in the grandchildren. The rights of these were not presented to the court and no provision was made for them. The court had power after the estate vested in enjoyment in the grandchildren to amend the final decree so as to protect the rights of these after-born children.
—Savela v. Erickson, 93.

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EXPLOSIVE. See PARENT AND CHILD, 1.

INJURY TO CHILD OF TENANT.

Leaving a small box of dynamite caps in a granary on a plate which is 9 feet and 10 inches from the floor is not of itself such negligence as will render the lessor liable for injury to the lessee's child, who is injured while playing with the caps.
—Peterson v. Martin, 195.

FRAUD. See ATTACHMENT; BILLS AND NOTES, 4; CORPORATION, 13.

IN PROCUREMENT OF SIGNATURE TO PROMISSORY NOTE.

See BILLS AND NOTES, 3, 5.

RESCISSION OF CONTRACT FOR FRAUD.

See CONTRACT, 4.

OPINION AS TO VALUE OF PROPERTY ORDINARILY NOT ACTIONABLE.

See SALE.

STATEMENT OF OPINION NOT ACTIONABLE.

1. Defendant was a stockholder in a corporation the success of which consisted in making sales of water from a spring which the corporation owned. The matter of financing the corporation had proved difficult and at a corporate meeting defendant made a motion for an issue of bonds. The motion was carried and the bonds issued. Statement by a representative of the corporation to defendant, to induce him to exchange stock for bonds and to renew notes given for the stock, that the bonds were good as gold, and that he could resell them, *held* a mere statement of opinion and not such misrepresentation of fact as to constitute actionable fraud.
—Thorpe v. Cooley, 431.

NO DUTY TO DISCLOSE FACTS.

2. Where both parties were experienced men, and neither had means of information not known to the other, there is no evidence of such relation between them that fraud can be predicated on nondisclosure of facts.
—Thorpe v. Cooley, 431, 434.

PLEADING.

See CORPORATION, 14.

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FREEZING. See WORKMEN'S COMPENSATION ACT, 7-9.

GAME AND FISH. See CRIMINAL LAW, 1-4.

GAMBLING.

SHAKING DICE FOR CIGARS IS GAMBLING.

See LANDLORD AND TENANT, 2.

GIFT.

BY FATHER TO DAUGHTER.

See MORTGAGE, 2.

TO A CLASS OF PERSONS.

See WILL, 7-9.

EXECUTED PAROL GIFT OF LAND.

1. Evidence that a son was induced to remain at home and work the farm, in consideration of the promise of his parents to give him the farm, and final performance of the promise by a gift verbally made and accepted, *held* sufficient to justify the jury in finding an executed parol gift to defendant of the land involved in the action.
—Drager v. Seegert, 6.

EVIDENCE.

2. A writing subsequent to the alleged gift to the effect that the donor had leased the farm in question to his son as long as the father lived for $100 a year and his room, etc., and signed by both parties, is persuasive but not conclusive evidence that the gift was not in fact made, but it is open to explanation by defendant and the effect of the document and the merit of the explanation were questions for the jury.
—Drager v. Seegert, 8.

GRAND JURY. See CRIMINAL LAW, 9.

CONTRACT BETWEEN DETECTIVE AND GRAND JURORS.

See DETECTIVE.

1. For grand jurors personally to finance criminal investigations is so at variance with the evident purpose of their work, under our theory of criminal procedure and the practice of modern jurisprudence, that no contract so to do should be implied from the fact that reports were received and made use of by the grand jury, or from the fact that its foreman requested the same or any other

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GRAND JURY—Continued.

service from outsiders. The foreman has no express or implied authority to incur expense for which the jury or the individual members will be liable.

—William J. Burns International Detective Agency v. Holt, 167.

SECRECY IN REGARD TO PROCEEDINGS.

2. A grand juror may not testify to conversations, had when none but his fellow members were present, relative to matters considered by them in the discharge of their duties. The secrecy enjoined by law in this respect is permanent.

—William J. Burns International Detective Agency v. Holt, 165.

GUARDIAN OF INCOMPETENT. See INSANITY.

HABEAS CORPUS.

DISCHARGE OF PRISONER.

1. Where the conviction is valid and only the sentence void, a defendant is not entitled to an unconditional discharge upon a writ of habeas corpus.

—State ex rel. v. Reed, 465.

2. If the sentence exceeds the penalty which the court had power to impose, it is void as to the excess; but the defendant cannot be discharged on habeas corpus until he has performed the part which the court had power to impose if it be severable from the unlawful part.

—State ex rel. v. Reed, 465.

PRISONER REMANDED WHEN SENTENCE IS VOID.

3. If the sentence is wholly void the defendant will be remanded for a lawful sentence.

—State ex rel. v. Reed, 465.

HERNIA. See INSURANCE, 20-22; JUDGMENT NOTWITHSTANDING VERDICT, 3.

HIGHWAY.

DUTY OF TRAVELERS AT RAILROAD GRADE CROSSING.

See RAILWAY, 3.

1. A legal highway by user is as good a basis for the contract to maintain in repair as if the road had been legally established.

—Town of Mount Pleasant v. Town of Florence, 362.

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HIGHWAY—Continued.

2. The town of Mount Pleasant in Wabasha county and the town of Florence in Goodhue county adjoin each other. In 1892 the supervisors of the two towns entered into a contract dividing into districts a highway between them, providing that each town should keep in repair the districts allotted to it, and that the expense of keeping in repair certain bridges on the highway should be borne by the two towns in equal shares. In 1914 one of these bridges became out of repair; plaintiff town applied to defendant town for cooperation in making the repairs, but defendant refused to take any part, whereupon plaintiff made the necessary repairs, and brought this action to recover of defendant one-half the cost thereof. It is *held*:

(1) The road between the two towns was a public highway by user.

(2) The findings of fact are sustained by the evidence.

(3) There was no prejudicial error in the rulings on evidence.

—Town of Mt. Pleasant v. Town of Florence, 359.

HOMESTEAD.

ABANDONMENT.

1. Where plaintiff ceased to occupy her homestead for 16 consecutive months, and failed to file a notice with the register of deeds, describing the premises and claiming the same as her homestead, she is deemed to have abandoned the same, and a judgment of record in the county attaches as a lien against the same after the lapse of 6 months from the time plaintiff ceased to occupy the premises.

—Hall v. Holland, 403.

2. The fact that she returned to her former homestead before the levy on it under an execution, does not defeat the lien of the judgment. Where there has been a loss of exemption of a homestead by abandonment, a resumption of occupancy as a home does not have a retroactive effect, but merely gives a new right as of the date of the resumption.

—Hall v. Holland, 405.

3. It was not error, under the proofs in this case, to exclude testimony as to the intent of the claimant to return and retain the premises in question as her homestead.

—Hall v. Holland, 403.

CONTRACT BY ONE SPOUSE FOR SALE.

4. A contract for the sale of the homestead, of which the husband and wife are owners as joint tenants, is not invalid for all purposes upon

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HOMESTEAD—Continued.

the ground that the same was executed by the wife without the husband joining therein, under section 6961, G. S. 1913, the husband thereafter confirming the same and both husband and wife being ready and willing to perform the conditions thereof and offering so to do. The sole object of the statute is to prevent the alienation of the homestead without both husband and wife joining therein. The statute was not intended for the protection of the purchaser, and may be enforced against him by the wife, her husband being ready and willing to join with her therein.
—Lennartz v. Montgomery, 170.

HOMICIDE. See CRIMINAL LAW, 7, 10-12.

HUSBAND AND WIFE. See DAMAGES, 5.

CONTRACT BY ONE SPOUSE FOR SALE OF HOMESTEAD.

See HOMESTEAD, 4.

SEPARATE MAINTENANCE.

1. A court of equity, independent of a proceeding for divorce or separation and without statutory authorization, has jurisdiction to decree the wife separate maintenance.
—Robertson v. Robertson, 290.

2. In such action temporary support pendente lite may be given the wife.
—Robertson v. Robertson, 290.

3. And an allowance may be made for attorney's fees and costs of suit.
—Robertson v. Robertson, 290.

4. The allowance of $40 a month for support, $75 for attorney's fees and $10 suit money, was not excessive.
—Robertson v. Robertson, 290, 292.

5. Suit money and attorney's fees are allowed the wife to the end that she may maintain the necessary suit against her husband. In effect and in a proper sense the allowance is for her support, assistance and maintenance and is not an award of costs within G. S. 1913, § 7973.
—Robertson v. Robertson, 291.

HYPOTHETICAL QUESTION. See EVIDENCE, 6.

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ICE. See MUNICIPAL CORPORATION, 19, 22.

PATCH OF ICE.

A "patch" of ice may be in the shape of an uneven ridge constituting an obstruction and menace to safe travel.
—Anderson v. City of Minneapolis, 352.

INDIAN. See ELECTION, 1, 2; EVIDENCE, 2.

1. Indians of the Red Lake band of Chippewas, inhabiting the Red Lake Indian reservation as wards of the government, are "residents" of the state withing the meaning of article 7 of the Constitution.
—Opsahl v. Johnson, 43.

WHEN A MIXED BLOOD INDIAN IS A CITIZEN.

2. A mixed blood Indian is a citizen if his father was. And no doubt more mixed bloods spring from a white father and an Indian or mixed blood mother than from a white mother and an Indian or mixed blood father. But probably very many of the mixed bloods of a white father are not the issue of lawful wedlock. An illegitimate child takes the status of the mother. It is also well known that many of the white men who assumed relations with Indian women were not citizens. The citizenship of mixed and full bloods residing upon the Red Lake reservation seems extremely doubtful.
—Opsahl v. Johnson, 45.

WHEN A NONCITIZEN MIXED BLOOD INDIAN CAN VOTE.

3. To entitle a noncitizen mixed blood Indian to the right of suffrage, his adoption of the habits and customs of civilization must go to the extent of submitting himself to the laws of the state. The evidence and findings established that the persons referred to were tribal Indians, residing upon the reservation as wards of the government, owing no allegiance to the laws of the state, not taxable, and not bearing any of the burdens to which other voters are subject.
—Opsahl v. Johnson, 43.

INFANT.

BOUND BY DECREE OF PROBATE COURT FOR DISTRIBUTION OF ESTATE.

See EXECUTOR AND ADMINISTRATOR, 6.

INJUNCTION. See EXECUTION.

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INSANITY.

EVIDENCE OF INCOMPETENCY.

In proceedings for the appointment of a guardian for the estate of an alleged incompetent, it is *held* that the evidence sustains the finding of the trial court that the person for whose estate the guardian was asked was not unable or incompetent to have the care and management of his property.

—Sterling v. Miller, 192.

INSURANCE.

ACCIDENT INSURANCE.

1. The accident insurance policy, issued by defendant, insured plaintiff against disability or death resulting from bodily injury effected through external, violent, and accidental means, and provided that if the loss of either foot should "result solely from such injury within 90 days from the date of the accident," the defendant would pay him a sum certain. Plaintiff suffered an accident to a toe on his left foot, within the meaning of the policy, on May 22, 1915. About three months later infection set in, and it became necessary to amputate the foot September 25, 1915. The loss did not take place within the time specified in the policy, and is not covered thereby.

—Orenstein v. Preferred Accident Insurance Company, 10.

2. The insured was accidentally hurled against and under a passing train of cars, and thereby sustained injuries resulting in the loss of his left arm and the fingers of his right hand. *Held* to be but one accident and one loss, within the meaning of an accident insurance policy, for which he was entitled to the full monthly accident indemnity provided for in the policy, during total disability not exceeding 48 months.

—Kangas v. Standard Accident Insurance Co. 418.

3. Part II of an accident policy specified the amount which would be paid for each specific loss and added "Not more than one of the indemnities provided in this Part II will be paid on account of loss resulting from any one accident. The occurrence of any loss for which indemnity is payable under this Part shall at once terminate this insurance." Part III provided a monthly accident indemnity for total and partial disability, and specified that "indemnity under this Part shall not be paid for any disability resulting from loss for which provision is made in Part II." *Held*: The provision quoted from Part II had no application to the facts of this case and plaintiff was entitled to the monthly indemnity specified in Part III during

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INSURANCE—Continued.

total disability not exceeding the number of months mentioned therein as the limit.

—Kangas v. Standard Accident Insurance Co. 420, 421.

AUTOMOBILE INSURANCE.

4. Defendant insurance company issued a policy to plaintiff insuring him against loss by reason of liability imposed by law for the destruction of or injury to the property of others arising from plaintiff's ownership, maintenance or use of certain automobiles. A clause of the policy provided that "the company's liability * * * is limited to the actual intrinsic value of the property damaged or destroyed at the time of its damage or destruction, which shall not be greater than the actual cost of the repair or replacement thereof." One of plaintiff's automobiles collided with another car and damaged it, under circumstances which rendered plaintiff liable. Defendant paid the owner of the injured car the amount of the bill for repairs paid by him. Thereafter the owner of the injured car recovered a judgment against plaintiff for the depreciation in the value of his car caused by the accident over and above the amount paid for repairs. Plaintiff paid this judgment, and brought this action to recover the amount so paid, with attorney's fees, from defendant under the policy. It is *held* by a majority of the court that the limitation clause above quoted does not limit the liability of defendant to the actual cost of repairs made, when it appears that they do not and cannot make the car as good as it was before the accident, and that plaintiff may recover the amount of the judgment paid by him for depreciation in the value of the car, with attorney's fees incurred in defending the suit.

—Christison v. St. Paul Fire & Marine Insurance Co. 51.

5. Replacement has much the same meaning as repair, but as used in an automobile insurance policy would seem to refer to cases where property is destroyed, rather than merely damaged, where repairs only will not restore it to its original condition.

—Christison v. St. Paul Fire & Marine Insurance Co. 54, 55.

EMPLOYER'S LIABILITY INSURANCE.

6. When the insurer, in an employer's liability policy, assumes the exclusive control of the defense of a suit upon an employee's claim, it becomes liable for the payment of a judgment obtained by the employee and an action may be maintained by the employer to re-

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INSURANCE—Continued.

cover from the insurer the amount of the judgment for the benefit of the employee without payment of the judgment.
—Standard Printing Co. v. Fidelity & Deposit Co. of Maryland, 304.

7. Having once assumed the defense, the insurer cannot relieve itself of this measure of liability by an unwarranted withdrawal from the case.
—Standard Printing Co. v. Fidelity & Deposit Co. of Maryland, 304.

8. There was no impropriety in an agreement by the employer to prosecute the suit for the benefit of the employee nor in counsel commenting on that fact.
—Standard Printing Co. v. Fidelity & Deposit Co. of Maryland, 304.

9. Under such circumstances, the employer may recover expenses incurred in defense of the employee's action after the insured withdrew, without payment of such expenses.
—Standard Printing Co. v. Fidelity & Deposit Co. of Maryland, 304.

FIDELITY INSURANCE—CONDITIONS OF BOND.

10. Section 1616, R. L. 1905 (section 3292, G. S. 1913), requiring a statement in full of the conditions of insurance to be incorporated in or attached to the policy, is applicable to the bonds or guaranty contracts issued by defendant.
—Pearson v. United States Fidelity & Guaranty Co. 240, 244.

11. The promises or warranties of stated examinations by the directors made by the bank in the application for insurance cannot be considered a part of the contract, because they were not attached to or incorporated in the bond, and failure to make such examinations could not avail as a defense.
—Pearson v. United States Fidelity & Guaranty Co. 246.

SAME—CONSTRUCTION.

12. It is well settled that the same rules of construction govern contracts of this kind and the ordinary fire and life insurance policies. Ambiguities therein are resolved in favor of the assured.
—Pearson v. United States Fidelity & Guaranty Co. 243.

SAME—RENEWAL OF BOND.

13. Defendant, for a premium paid, issues bonds guaranteeing to employers the fidelity of employees. It so issued a bond to the bank represented by plaintiff and, from time to time, gave written

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INSURANCE—Continued.

renewals thereof. It is *held* that the transactions did not constitute separate bonds. The effect of the renewals was merely to extend the time covered by the bond.

—Pearson v. United States Fidelity & Guaranty Co. 240.

SAME—EVIDENCE.

14. Defendant was not entitled to judgment notwithstanding the verdict, on the ground that it conclusively appeared that the assured had failed to carry out the conditions of the bond.

—Pearson v. United States Fidelity & Guaranty Co. 240.

15. The record discloses no error prejudicial to defendant.

—Pearson v. United States Fidelity & Guaranty Co. 240.

16. The verdict is sustained by the evidence and is not contrary to the law as given by the court. The requests refused were not appropriate to the issues presented or else were so involved as to be of doubtful help to the jury.

—Pearson v. United States Fidelity & Guaranty Co. 240.

FIRE INSURANCE.

17. In December, 1907, defendant issued its certain policy of insurance to the copartnership of Seaman & Martin; in July, 1909, during the life of the policy the members of the copartnership formed a corporation under the name of Seaman-Martin Company; defendant continued thereafter to renew the insurance, and it was in force at the time the property covered thereby was destroyed by fire on April 10, 1911. It is *held*, following a former decision in the case: (a) That the evidence presented a question of fact upon the issue whether defendant had knowledge of the formation of the corporation, and with that knowledge issued and renewed the policy of insurance upon which the action is founded, knowing also that the corporation then owned the insured property; and (b) that the verdict of the jury thereon is not clearly against the weight of the evidence.

—Lenning v. Retail Merchants Mutual Fire Insurance Co. 233.

18. The evidence justified the jury in finding that defendant waived the prompt payment of the premium due on the policy preceding the fire and there was no error in the admission of the evidence tending to show such waiver.

—Lenning v. Retail Merchants Mutual Fire Insurance Co. 234.

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INSURANCE—Continued.

19. General Statutes 1913, § 3306, and the by-laws of the company, which form a part of the insurance contract, to the effect that a failure to pay the premium within the time thereby prescribed shall without notice or other act on the part of the company void the contract, do not preclude a waiver of such payment by the acts and conduct of the insurance company. Johnson v. Retail M. M. F. Ins. Co. 112 Minn. 418, 128 N. W. 462, followed and applied.

—Lenning v. Retail Merchants Mutual Fire Insurance Co. 234.

HEALTH AND ACCIDENT INSURANCE.

20. Representations that the insured had not had fits or hernia or received medical or surgical attention within five years are material under a statute avoiding a policy for misrepresentations which "materially affected either the acceptance of the risk or the hazard assumed."

—Olsson v. Midland Insurance Co. 424.

21. Defendant refused to pay a claim because of the alleged failure of plaintiff to insert in the application mention of a second operation for hernia, and claimed the failure to be concealment of a material fact, and that this increased the risk of loss and rendered the policy invalid. Plaintiff testified he informed the agent of the second operation and handed her an old policy which contained mention of that operation, and she used it in making out the new application; that before signing the application he looked it over and thought it contained mention of the second operation. The issue was submitted to the jury which decided adversely to defendant. *Held*: The verdict was sustained by the evidence.

—Zimmerman v. Bankers Casualty Co. 443, 444, 445.

22. Evidence that the insured was a Swede 24 years old, who had been in this country 8 years; that the district manager of defendant wrote the application; that previously while representing another company the district manager had written insurance for the insured in that company; that the insured had allowed that prior insurance to lapse; that the district manager was getting the insured away from the other company. The only witness to the transaction was the district manager and he was interested. The evidence does not conclusively show that statements contained in the application of the insured to the effect that he had never had fits or hernia and had not received medical or surgical attention within five years were knowingly made.

—Olsson v. Midland Insurance Co. 424, 429.

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INSURANCE—Continued.

23. Evidence of a physician that he had treated the insured 50 or 60 times within a year prior to the application for insurance, but that he had kept no record of his treatments or of the dates, and of the insurer's wife that she never heard of her husband's consulting the physician, although the latter gave her treatments about the same time, does not conclusively show that a representation that the insured had not received medical or surgical attention within five years was false.

—Olsson v. Midland Insurance Co. 424.

24. Where the agent of an insurance company, authorized to procure applications and forward them to the company, makes out an application incorrectly, notwithstanding that all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer, and not to the insured, and such statement will not have the effect of avoiding the policy. This rule is not affected by a stipulation in the policy subsequently issued, that the acts of the agent in making out the application shall be deemed the acts of the insured.

—Zimmerman v. Bankers Casualty Co. 442, 445.

25. Under an accident policy silent as to the effect of suicide the insurer is liable though the insured committted suicide, if at the time he was insane.

—Olsson v. Midland Insurance Co. 425.

26. That a copy of the application is attached to the policy as is required by statute, and retained by the insured, does not as a matter of law charge him with knowledge of the representations written therein or estop his beneficiary from showing that they were not in fact made.

—Olsson v. Midland Insurance Co. 425.

MUTUAL BENEFIT INSURANCE.

NO WAIVER OF NONPAYMENT OF ASSESSMENTS.

27. An officer of the local lodge of the defendant association from time to time, at the request of the insured, advanced assessments coming due and paid them to the association. He did not assume to overlook or excuse defaults, but advanced money to avoid them. He made similar advances for others. No assessments were advanced by the local lodge for the insured nor did it consent to non-

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INSURANCE—Continued.

compliance with the constitution of the association. It is *held*: the evidence made no question of waiver for the jury either through the conduct of such officer or of the local lodge.

—Havlicek v. Western Bohemian Fraternal Assn. 62.

28. Prior to the death of the insured, and when he stood suspended from the benefits of insurance because of a failure to pay assessments, the officer of the local lodge sent him a statement of amounts due, which included amounts which he had advanced him, with a notice that they must be paid by a specified day, prior to which day the deceased died. The day specified was the day on which a third unpaid assessment would result in suspension by the provisions of the constitution. This notice was not one required by the constitution. It is *held* that its effect was not to recognize the insured as in good standing, with insurance in effect until the day specified, and that it did not, alone or in connection with other acts, constitute a waiver by the company.

—Havlicek v. Western Bohemian Fraternal Assn. 62.

SAME—REINSTATEMENT OF INSURED.

29. On the night before the day when deceased died, and when he stood suspended, though subject to reinstatement in the manner provided by the constitution, a check for the amount of his unpaid assessments was sent by another in his behalf by mail to the financial secretary. The latter received it after the death of the insured, refused to accept it, and returned it to the sender. It is *held* that such sending and receipt of the check did not work a reinstatement of the insured.

—Havlicek v. Western Bohemian Fraternal Assn. 62.

30. There was no claim of payment of certain accrued assessments except by the check referred to in the preceding paragraph. In view of this there was no prejudicial error, if any at all, in receiving in evidence one of the books of the defendant showing the standing of the deceased relative to the payment of dues and assessments.

—Havlicek v. Western Bohemian Fraternal Assn. 63.

SAME—FALSE STATEMENT IN APPLICATION.

31. In an action on a beneficiary certificate issued by a benefit association, one defense was that deceased, a married woman, stated falsely in her application that she was not pregnant. The evidence sustains a finding that the statement was true.

—Nardinger v. Ladies of the Maccabees of the World, 16.

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INSURANCE—Continued.

32. Deceased died February 13. On the morning of that day a child was removed from her. It was a 7-months old child. On the preceding June 29 she answered in the negative the question in her application for insurance whether she was pregnant. *Held*: The evidence justified the verdict that the answer was true.
—Nardinger v. Ladies of the Macabees of the World, 17.

SAME—CAUSE OF DEATH.

33. The beneficiary certificate sued on in this case exempted defendant from liability in the event of death from complications arising from pregnancy or childbirth. The evidence is sufficient to sustain the finding of the jury that death did not result from such cause.
—Nardinger v. Ladies of the Maccabees of the World, 16.

INTEREST. See APPEAL AND ERROR, 26.

INTERPLEADER. See SET-OFF AND COUNTERCLAIM, 2.

INTERVENTION.

BY ATTORNEY TO ENFORCE HIS LIEN FOR COMPENSATION.

See ATTORNEY AND CLIENT, 1-3.

INTOXICATING LIQUOR.

LIABILITY OF SALOON KEEPER FOR CAUSING DEATH.

See DAMAGES, 1.

SALE ON SUNDAY—PROXIMATE CAUSE OF DEATH.

1. A sale of intoxicating liquor by a licensed saloon keeper on Sunday is illegal, and under G. S. 1913, § 3200, liability ensues for the proximate result of it.
—Fest v. Olson, 31.

2. The evidence sustains the finding of the jury that the plaintiff's husband purchased intoxicating liquor in the saloon of each of the defendants on a Sunday, became intoxicated by its use, and as a proximate result of his intoxication was drowned.
—Fest v. Olson, 32.

CONTRIBUTING CAUSE OF DEATH.

3. To render a licensed saloon keeper liable for an illegal sale his sale need not be the sole cause of intoxication. It is enough if it is a

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INTOXICATING LIQUOR—Continued .

co-operating, or concurring or proximately contributing cause. The charge of the court upon this point was correct.
—Fest v. Olson, 31.

JUDGMENT. See PRINCIPAL AND SURETY, 6.

EVIDENCE.

See PRINCIPAL AND SURETY, 5.

LIABILITY OF INSURER OF EMPLOYER TO PAY JUDGMENT IN FAVOR OF EMPLOYEE.

See INSURANCE, 6.

VACATING DEFAULT.

1. The trial court acted within its discretion in vacating the judgment and permitting one of the defendants to answer.
—Knoll v. Blanchard, 476.

SAME—POSTMARK AS EVIDENCE.

2. The defendant moved to vacate a default judgment upon the ground that it was entered after he had served his answer and when he was not in default. His evidence was that his answer, which was served by mail, was deposited in the proper post office on the last day for answering. If so deposited there was service. The evidence of the plaintiff was that it was not received until three days after the time for answering. The postmark on the envelope bore date two days after. The postmark was evidence of the time of mailing, and the finding of the court that the answer was not served in time is *held* sustained.
—Kay v. Elsholtz, 153.

OPTION UNDER ALTERNATIVE JUDGMENT.

3. Where the findings order a judgment giving one party an alternative, such party need not indicate his choice of alternatives until the judgment is entered.
—National Council of Knights & Ladies of Security v. Silver, 331.

CORRECTION OF MISTAKE.

4. In general, the allowance of amendments is within the discretion of the trial court, but where the mistake is conceded, where it is material, where the judgment is unexecuted, and the parties are still in statu quo, and the rights of no third parties have intervened, the parties are entitled to a correction as a matter of right, and it is

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JUDGMENT—Continued.

the duty of the court to make the correction. Mere delay does not bar the right.

—National Council of Knights & Ladies of Security v. Silver, 330.

5. Where the clerk of the court by mistake enters a judgment other than that ordered by the judge, the mistake should be corrected and a judgment entered determining the case as the court ordered it determined.

—National Council of Knights & Ladies of Security v. Silver, 330.

6. Such correction may be made after the time for appeal has expired.

—National Council of Knights & Ladies of Security v. Silver, 330.

7. In an action of replevin a verdict was directed and judgment was entered for the plaintiff for the recovery of possession of property located in a certain building. No issue was tried by the jury. The plaintiff offered no evidence of right of possession except a chattel mortgage covering property contained in the building at its date, but not after-acquired property, and no issue was tried as to the right of possession of property afterwards put with that mortgaged. By mistake and inadvertence a verdict was directed and judgment entered for the recovery of possession generally. On motion of the defendant made within the time for appeal the court, a judge other than the one presiding at the trial sitting, amended the judgment by limiting the recovery of possession to the property included in the mortgage. *Held* no error.

—Northwestern Mutual Investment Co. v. Aylmer, 140.

8. The fact that an application asking the judge to change his judicial opinion is denied, because made too late, does not bar a subsequent application to correct a mistake.

—National Council of Knights & Ladies of Security v. Silver, 331.

AMENDMENT OF DECREE OF DISTRIBUTION.

See EXECUTOR AND ADMINISTRATOR, 7-9.

COLLATERAL ATTACK.

IN SEQUESTRATION PROCEEDINGS BY STOCKHOLDERS ON COLLUSIVE JUDGMENT AGAINST CORPORATION.

See CORPORATION, 13.

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JUDGMENT—Continued.

ESTOPPEL BY VERDICT.

9. It is sufficient to operate as an estoppel that the present parties were adversary parties in a former action with respect to the precise issue, and that it was determined therein upon the merits.
—Cronan v. Wolfe, 308.

10. A former judgment, based upon an issue presented in this action, *held* final and a bar to retrial thereof, though the parties in the former action were not the same as in this action.
—Cronan v. Wolfe, 308.

ACTION TO ANNUL JUDGMENT.

See NEW TRIAL, 3.

LIEN ON ABANDONED HOMESTEAD.

See HOMESTEAD, 1, 2.

ACTION ON FOREIGN JUDGMENT.

11. An Illinois judgment, entered August 13, 1907, was not outlawed March 16, 1916, under the Illinois statutes which provide that no execution shall issue on a judgment after 7 years, but that action of debt on the judgment may be brought within 20 years after the date of the judgment. Section 7709, G. S. 1913, which provides that when a cause of action has arisen outside of this state, and by the laws of the place where it arose action thereon is barred by lapse of time, no such action shall be maintained in this state, has no application to such a case.
—J. L. Bieder Co. v. Rose, 121.

JUDGMENT NOTWITHSTANDING VERDICT. See INSURANCE, 14.

1. Judgment notwithstanding verdict will never be granted for error in either law or procedure committed at the trial.
—Hoggarth v. Minneapolis & St. Louis Railroad Co. 472.

2. In a personal injury suit, the evidence is *held* insufficient to sustain a verdict for the plaintiff, and the trial court rightly granted judgment notwithstanding the verdict.
—Gorgenson v. Great Northern Railway Co. 267.

3. The evidence did not conclusively show that the insured knowingly made false representations as to hernia, fits or medical or surgical attention, and judgment for the defendant notwithstanding the verdict for the plaintiff should not have been entered.
—Olsson v. Midland Insurance Co. 425.

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JURY.

ASSESSMENT OF DAMAGES BY JURY.

See EMINENT DOMAIN, 7.

LANDLORD AND TENANT.

RECOVERY OF TENANT'S PROPORTION OF DAMAGES RECEIVED BY LANDLORD.

See EMINENT DOMAIN, 8.

BREACH OF COVENANT TO HEAT PREMISES RESULTING IN DEATH OF TENANT.

See DEATH BY WRONGFUL ACT.

ESTOPPEL BY LEASE.

See ESTOPPEL.

NEGLIGENCE OF LANDLORD IN LEAVING DYNAMITE.

See EXPLOSIVE.

RIGHT TO RE-ENTER.

1. Where the lease as originally prepared contained both a covenant against subletting and a condition authorizing the lessor to re-enter in case of a subletting, and the parties erased the covenant, but left the condition, the condition remained in force.
—Zotalis v. Cannellos, 179.

2. Shaking dice for cigars is gambling within the meaning of the provision in the lease which authorizes the lessor to terminate the same in case gambling is allowed upon the premises.
—Zotalis v. Cannellos, 179.

3. The violation of a condition in the lease cannot be said to be trivial, when the violation is of such character that the lessor may be subjected to a criminal prosecution on account thereof.
—Zotalis v. Cannellos, 182.

TERMINATION OF LEASE FOR NONPAYMENT OF RENT.

4. A provision in a lease that upon default for 60 days by the lessee in payment of rent, the lease shall become ended and determined, gives an option of termination to the lessor, which he may avail himself of or waive, as he sees fit. It does not give the lessee the right to secure a termination of the lease by his own default.
—Lowenthal v. Newlon, 248.

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LANDLORD AND TENANT—Continued.

RIGHT TO RE-ENTER NOT WAIVED.

5. By accepting rent after knowledge of a breach of the conditions of the lease, the lessor waives the right to re-enter for such breach, but does not waive the right to re-enter for a similar breach committed thereafter.
—Zotalis v. Cannellos, 179.

6. The lessor accepted rent with knowledge that a part of the building had been sublet; but the remainder of the building was sublet thereafter, and he is entitled to re-enter for this subsequent breach of the condition against subletting.
—Zotalis v. Cannellos, 179.

PLEADING—ACCEPTANCE OF SURRENDER.

7. An allegation in an answer that defendant "did then and there surrender to said plaintiffs all buildings and improvements on said described estate" is not an allegation at all of an acceptance of such surrender by plaintiffs, and is probably not a sufficient allegation of a surrender of the leased premises by defendants.
—Lowenthal v. Newlon, 250.

LIMITATION OF ACTION.

CONSTRUCTION OF NEW STATUTE.

1. Where a new statute of limitation is enacted, one rule is to construe the statute as applying only to causes of action arising after its passage, unless a contrary intent is made to appear. Another rule is to construe the statute as affecting existing causes of action but as commencing to run at the time the statute takes effect, so that pre-existing causes of action not already barred are treated as if accruing at the time of the enactment of the new statute. The latter rule is that adopted by the Supreme Court of the United States. The former rule is the rule adopted in Minnesota. The rules are inconsistent, but the court adheres to the Minnesota rule.
—State ex rel. v. District Court of St. Louis County, 214, 215.

UNDER 1915 AMENDMENT OF THE WORKMEN'S COMPENSATION ACT.

See WORKMEN'S COMPENSATION ACT, 1.

WHEN STATUTE BEGINS TO RUN.

2. The agreement being that the services of the son should not be paid

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LIMITATION OF ACTION—Continued.

for until the father's death, the statute of limitations did not begin to run until that event.

—Wagner v. Seaberg, 37.

CONTRACT TO MAKE DEVISE.

3. A contract by defendants to make plaintiff their heir and to leave him at their death all their property, in consideration of his becoming a member of their household and performing such services as would be expected from a natural son is continuing in character, and an attempted renunciation thereof by the promisor does not set in motion the statute of limitations.

—Wold v. Wold, 410.

ACTION ON FOREIGN JUDGMENT.

See JUDGMENT, 11.

MALICE. See DAMAGES, 2.

MANDAMUS. See CRIMINAL LAW, 8.

MASTER AND SERVANT. See WORKMEN'S COMPENSATION ACT.

IMPLIED AUTHORITY OF SERVANT TO EMPLOY ASSISTANCE IN EMERGENCY.

See WORKMEN'S COMPENSATION ACT, 4.

ACTION FOR INJURY TO SERVANTS OF RAILWAY.

1. Action for death of plaintiff's intestate while in defendant's employ as a brakeman. The rear section of the freight train had been standing 70 minutes. When the engine finished switching, it backed up to and coupled onto the rear section, pushing the standing cars back 20 or 30 feet with some violence and decedent was run over and killed. It was his duty to put a red light on the rear of the train at sunset. It was then an hour after sunset. It had been dusk or dark all that time. There was evidence that deceased was about to place the light. But the red lantern customarily used was in the caboose at the time of the accident. *Held*: The train crew were not wanting in ordinary care in not anticipating decedent might be placing the light and in a place of peril at the precise time they caused the train to back.

—Gorgenson v. Great Northern Railway Co. 267, 269.

2. A locomotive of defendant became derailed at a highway crossing by striking a pile of sand and gravel that was upon the crossing.

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MASTER AND SERVANT—Continued.

Plaintiff, the fireman, was injured. The evidence failed to show how the sand and gravel came to be there, or that it had been there any length of time before the accident. It is *held*:

(1) The rule of res ipsa loquitur has no application, as the crossing was not in the exclusive possession or control of defendant.

(2) The evidence did not justify an inference of negligence on the part of defendant.

—McGillivray v. Great Northern Railway Co. 278.

3. Evidence that plaintiff switchman stood in a narrow space between two tracks in defendant's yard observing the marks on the cars passing him on one track when he was struck in the face by a "bunch" of wires about one foot long, one end of which was attached to a stake pocket on a moving gondola car, and used in staking down loads where the stake pockets are outside. He was startled and jumped backward striking his back against a stationary car on the adjoining track. *Held*: The evidence on the issue of whether plaintiff's injuries were proximately caused by negligence on the part of defendant presented a question of fact for the jury.

—Prendergast v. Chicago, Burlington & Quincy Railroad Co. 298.

MECHANIC'S LIEN.

ENFORCEMENT.

1. Two of the mechanics' lien statements here involved stated that the materials were furnished for the construction of a brick manufacturing plant, of a named owner, upon a certain 100-acre tract. In selecting the 40 acres, to which the lien must be confined, the court included 20 acres not described in the said lien statements, but which belonged to the owner of the plant and were used and adapted for the manufacture of brick. The error in the description in the lien statement did not preclude the selection made.

—Morrison County Lumber Co. v. Duclos, 20.

SAME—PRIORITY OF MORTGAGE.

2. A lien claimant who does not, within one year after furnishing the last item of the labor or material, make a subsequent mortgagee a party to an action wherein the lien is foreclosed, or asserted, loses his priority, and the lien is gone as to such mortgagee.

—Morrison County Lumber Co. v. Duclos, 20.

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MECHANIC'S LIEN—Continued.

SAME—APPORTIONMENT OF MORTGAGE DEBT.

3. Where a mortgage exists on a tract of land, and thereafter mechanics' liens attach to a part thereof, the court may not, in an action to foreclose the latter, apportion the mortgage debt so as to fix only a certain amount thereof upon the part charged with the mechanics' liens.

—Morrison County Lumber Co. v. Duclos, 20.

MISCARRIAGE. See CRIMINAL LAW, 10.

MORTGAGE. See SET-OFF AND COUNTERCLAIM, 1.

PRIORITY OF MORTGAGE TO MECHANIC'S LIEN.

See MECHANIC'S LIEN, 2.

CONSIDERATION.

1. Action for foreclosure of mortgage. The complaint did not set out the consideration of the mortgage, but the mortgage, attached to the complaint, recited that the maker received from her father in his lifetime $1,000 "as an advancement," that she did not acknowledge the receipt in writing and was desirous that the amount should be deducted from her share in her father's estate and "in consideration of the said sum" of $1,000 gave the mortgage to secure that amount to the other children. Her heirs demurred to the complaint and it was held the mortgage was without consideration.

—Kuhne v. Gau, 35.

2. Where a father makes an advancement to his daughter and then dies testate, the advancement becomes a mere gift. A promise to repay it to other heirs and a mortgage given to secure the performance of such promise are without consideration.

—Kuhne v. Gau, 34.

3. When seals were in use in this state, a seal affixed to a contract imported a good consideration, but where the contract purported to state the consideration and the consideration stated is not good, it will not be presumed that some other consideration existed which was good.

—Kuhne v. Gau, 34.

APPORTIONMENT OF MORTGAGE DEBT.

See MECHANIC'S LIEN, 3.

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MOTOR VEHICLE. See AUTOMOBILE.

MUNICIPAL CORPORATION.

DELEGATION OF GOVERNMENTAL POWER.

1. As caretaker of the public streets a municipal corporation acts merely as a governmental agency. The legislature can at any time modify, limit or revoke the agency granted the municipality in this respect. By Laws 1915, p. 208, c. 152, it took away from municipalities the power to license the occupation of the streets by telephone companies and placed it exclusively with the Railroad and Warehouse Commission. However, the regulation of the use of the streets by the companies so as not to interfere with the safety and convenience of the public travel thereon is still retained by municipalities.
—State ex rel. v. Holm, 283.

SAME—TO CITY OF ST. PAUL.

2. It is a question of state law whether through legislative delegation the city of St. Paul has power in an appropriate case to compel a railway company to bridge a street at the intersection of a street and railway. That it has such power is unquestioned.
—City of St. Paul v. Great Northern Railway Co. 27.

POWER TO COMPEL RAILROAD TO CONSTRUCT BRIDGE.

3. A municipality with properly delegated police power in an appropriate case may compel railroads to construct overhead or other crossings at their own expense. The duty resting on the railway is a continuing one, exists though the character of public travel and the demands of public necessity and safety change, and the police power residing in the municipality cannot be abridged, nor surrendered nor bargained away.
—City of St. Paul v. Great Northern Railway Co. 27, 28.

4. In an ordinance directing a street railroad company to extend its line there was a proviso that the city would strengthen a railroad bridge which the extended line must cross. *Held*, in an action to recover from defendant the amount paid by plaintiff to strengthen the bridge, this proviso was not important. If the duty rested on defendant, the city could not waive or surrender it by an arrangement with the street railway or even by a contract with defendant.
—City of St. Paul v. Great Northern Railway Co. 31.

POLICE.

See MUNICIPAL CORPORATION, 20, 21.

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MUNICIPAL CORPORATION—Continued.

DISCHARGE OF STREET COMMISSIONER BY CITY COUNCIL NOT A JUDICIAL ACT.

5. Under Laws 1913, c. 105, § 11, providing that the city council of Minneapolis shall have the power to discharge at will any subordinate employee, but that the discharge shall be forthwith reported in writing, together with the cause thereof, to the civil service commission, the act of the council in discharging a street commissioner is not a judicial or quasi judicial act, and certiorari will not lie to review it.
—State ex rel. v. City of Minneapolis, 182.

PUBLIC IMPROVEMENT.

See CONSTITUTION, 3.

6. The words "resident owners," as used in section 243 of the charter of the city of St. Paul, considered, and *held* to apply only to parties owning property on the line of the improvement and residing within the city.
—Sullwold v. City of St. Paul, 271.

ASSESSMENT OF PRIVATE CEMETERY FOR PUBLIC IMPROVEMENT.

See CEMETERY, 2.

7. It does not appear that the assessment in question cannot be collected in the usual course out of lands of the cemetery not in use for burial purposes.
—Diocese of St. Paul v. City of St. Paul, 67.

8. In determining that the lands comprising the cemetery were benefited by the improvement, it is not shown that the common council made a demonstrable mistake of fact, or applied an erroneous rule of law.
—Diocese of St. Paul v. City of St. Paul, 67.

TRAFFIC ORDINANCE OF MINNEAPOLIS.

See APPEAL AND ERROR, 25.

9. The provision of the Minneapolis traffic ordinance that vehicles upon certain designated streets shall have the right of way, at street intersections, over vehicles upon the intersecting streets is merely a traffic regulation and not one restricting the use of motor vehicles within the statute, and is not abrogated by the motor vehicle law (G. S. 1913, § 2637). But that law annuls all city and village

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MUNICIPAL CORPORATION—Continued.

ordinances regulating the use or speed of motor vehicles and undoubtedly abrogates all other municipal regulations which are inconsistent with it.

—Bruce v. Ryan, 264, 265.

STREET.

See ICE.

USE OF STREET BY STREET RAILWAY.

10. The use of a street for street railway purposes is a proper street use. It is in aid of and facilitates public travel. It is a mode of using the street by the public and such use does not impose an additional servitude upon abutting property.

—City of St. Paul v. Great Northern Railway Co. 28.

11. The principle upon which the liability of a railroad rests is clear. Its tracks interrupt street uses. It must restore the street to a condition of usefulness for public travel. A street railway affords one mode of street travel. The railway must make the street which it has disturbed fit for such use whether such use was needed when the bridge was constructed or only becomes necessary afterwards.

—City of St. Paul v. Great Northern Railway Co. 29.

USE OF STREET BY PEDESTRIANS.

12. The use of the street outside of the sidewalk is primarily for traffic by teams and other vehicles, and the use of the sidewalk primarily for pedestrians, but pedestrians still have the right to use the street when the necessity arises. It has never been held, to the knowledge of the court, that they have not such right, or that the duty of a municipality to use reasonable care to keep the streets in safe condition does not extend to making them reasonably safe for pedestrians who have occasion to be upon that portion of the street ordinarily traveled by vehicles.

—Thoorsell v. City of Virginia, 58.

13. Plaintiff, crossing diagonally across a street, looked east as she stepped from the sidewalk and saw nothing except a large auto truck 7 feet high standing at the curb, and then looked west. After she had passed into the street about 5 feet outside the truck, she looked east again and saw defendant's automobile a short distance away, coming directly toward her at a high rate of speed. It swerved toward the curb as if to pass behind her, and she hurried

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MUNICIPAL CORPORATION—Continued.

forward. It then swerved toward the center of the street and struck her. *Held*: The evidence made the issue as to contributory negligence a question for the jury.

—Theisen v. Durst, 353, 354.

USE OF STREET BY TEAMSTER.

14. Evidence that plaintiff was riding a bicycle on a street running west, having a double street car line; that as he approached a cross street one of defendants, who was driving east on the former street, swung his rig across the street car tracks, intending to enter the cross street. The two vehicles reached the westerly corner of the cross street at about the same time and plaintiff claimed that the neck and shoulder of defendant's horse struck him and caused him to fall from his bicycle. *Held*: The evidence made defendant's negligence and plaintiff's contributory negligence questions of fact for the jury.

—Notaro v. Mandel, 422, 423.

USE OF STREET BY AUTOMOBILE.

15. Evidence that defendant's son was traveling 20 or 25 miles per hour on a rainy night; that the wind shield was so covered with mist that the driver could see little through it; that the lights of the automobile were dim and not of much assistance to the driver or much of a warning to pedestrians; that the horn was not sounded as the car approached several people on a street crossing, was sufficient to take to the jury the questions of the negligence of the driver and the contributory negligence of plaintiff, and to sustain the verdict for plaintiff. There was no error in the court giving the jury the statutory provisions as to lights on automobiles at night and as to slowing down and giving signals when approaching pedestrians.

—Powers v. Wilson, 407.

16. Whether the father was liable for his son's negligence in driving the father's automobile was a question for the jury. The evidence was substantially the same as on the former trial, and the decision there is controlling here.

—Jensen v. Fischer, 483.

17. Testimony that a person has driven an automobile for 8 or 10 years and that he "sometimes" slowed up at street intersections, hardly tends to prove that long experience will produce careful drivers.

—Christison v. St. Paul City Railway Co. 458.

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MUNICIPAL CORPORATION—Continued.

DEFECT IN STREET.

18. In this action to recover for injuries sustained by plaintiff from tripping and falling in a hole in a city street from which a slab of paving material had been removed, it is *held*:

(1) The evidence justified a finding that defendant was negligent in not guarding or lighting the hole at night.

(2) Plaintiff was not guilty of contributory negligence as a matter of law, and the evidence sustains the finding of the jury that he was not.

—Thoorsell v. City of Virginia, 55, 56.

TRENCH IN SNOW.

19. The digging of a trench from 6 to 10 feet long and 3 feet wide at the top in snow and ice along the curb in a public street, in the spring of the year during the breaking up season, and leaving the same unguarded, does not, under the showing in this case, constitute actionable negligence.

—Dorgan v. City of St. Paul, 347.

NOTICE OF DEFECT TO CITY OF MINNEAPOLIS.

20. Under the charter of Minneapolis, the mayor has control and supervision of the police department and is empowered to make rules for the government of the department. Among such rules, in force for 30 years, is one requiring policemen to note all defects in streets from which accidents may occur and report the same to the officer commanding his precinct and requiring such officer to make a record thereof. For this period such defects have been reported by the police department to the officer of the city charged with the duty of making repairs, and the police have been furnished with lights to guard defective places at night until repair could be made. *Held*, that notice to the officer in charge of a police precinct of a defect in a street is actual notice to the city.

—Engel v. City of Minneapolis, 438.

21. The mayor having, by the city charter, "control and supervision of the police force," may very properly be regarded as vested with power to impose upon the police by rules and regulations the duty of reporting defects in the public streets.

—Engel v. City of Minneapolis, 441.

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MUNICIPAL CORPORATION—Continued.

STATUTORY NOTICE OF CLAIM FOR DAMAGES.

22. A notice of claim under section 1786, G. S. 1913, for loss or injury sustained on account of a defect in a public street, sidewalk, or public grounds of a city sufficiently states the circumstances if the defect causing the injury is pointed out so that a full investigation may be had. It need not be as specific as the complaint in an action to enforce the claim, but must assign the same defect as the cause of the injury. Under this rule, a "patch of ice," given in the notice as the cause of plaintiff's injury, is a sufficient designation of the circumstances to admit proof of "an uneven ridge of ice," the defect alleged in the complaint.

—Anderson v. City of Minneapolis, 350.

23. The main purpose of section 1786 is not to require such a statement of the circumstances as to show an absolute liability, but rather such information that the authorities may be able to make a full investigation of the cause of the injury and determine the city's liability therefor.

—Anderson v. City of Minneapolis, 352.

NAME.

OF PERSON TO WHOM LAND IS ASSESSED.

See TAXATION, 2.

NEGLIGENCE. See BILLS AND NOTES, 5; MASTER AND SERVANT, 1, 3; MUNICIPAL CORPORATION, 15, 18; RAILWAY, 5.

OF BAILEE.

See BAILMENT, 1, 2.

OF DIRECTORS OF CORPORATION.

See CORPORATION, 15.

WANTON NEGLIGENCE.

1. If a person is in a place of peril, no matter if he came there through his own negligence, another who discovers him in such place of peril is obliged to use ordinary care to avoid injuring him. Failure to exercise such care is said in law to constitute wanton or wilful negligence.

—Ashe v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 178.

2. Defendant's trainmen on the east bound train saw plaintiff standing

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NEGLIGENCE—Continued.

between the tracks, but thought he was in the clear. Plaintiff, too, thought he was. There is no ground for a claim of wanton negligence on the part of defendant's trainmen.

—Ashe v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 176.

PROXIMATE CAUSE.

See MASTER AND SERVANT, 3.

INDEPENDENT CAUSE INTERVENING.

3. Where, subsequent to the original negligent act, a new and independent cause has intervened, of itself sufficient to stand as the cause of the injury, such facts will be considered the proximate cause of the injury, and the original negligence too remote; but where there is a conflict in the testimony as to the facts constituting the intervening cause, the question is for the jury.

—Peterson v. Martin, 195.

PROXIMATE CONSEQUENCE.

See DAMAGES, 4.

CONTRIBUTORY NEGLIGENCE.

See MUNICIPAL CORPORATION, 13, 14, 15, 18; RAILWAY, 4, 6; STREET RAILWAY, 2, 3.

4. Plaintiff, a switchman in a yard with two tracks, called respectively the east bound and west bound tracks, was guarding his train approaching on the west bound track. He stood between the east and west bound tracks and within the sweep of an engine on the east bound track. There was no necessity of his standing so near that track. He knew that a train was due on that track in a minute or two, yet he stood with his back to it until it struck him. *Held*, he was guilty of contributory negligence.

—Ashe v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 176.

IMPUTED NEGLIGENCE.

See PARENT AND CHILD, 1.

QUESTION FOR JURY.

5. The evidence in this case was insufficient to warrant submitting to the jury the question whether defendant, engaged in constructing a tile ditch across plaintiff's pasture under contract with the county,

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NEGLIGENCE—Continued.

was negligent in not refilling the ditch before a cow of plaintiff fell into it.

—Carlstrom v. North Star Concrete Co. 151.

NEW TRIAL.

BECAUSE OF VERBAL INACCURACIES IN CHARGE.

1. A certain latitude as to the form and expression of a charge is necessarily left to the trial judge. It is not improper for him to state the reasons which called legal rules into being. He may direct the attention of the jury to the relevancy of certain evidence to particular issues, so long as the determination of such issues is left to them. Mere verbal inaccuracies in the charge will not be ground for a new trial, unless attention was called thereto before the jury retired.

—Flick v. Ellis-Hall Co. 364.

BECAUSE OF NEWLY DISCOVERED EVIDENCE.

2. The granting of a new trial upon the ground of newly discovered evidence is addressed largely to the discretion of the trial court, and where the same is merely cumulative, it was not error to refuse a new trial.

—Larson v. Wisconsin Railway, Light & Power Co. 158.

3. Courts exercise great caution in granting new trials on the ground of newly discovered evidence. They exercise still greater caution in annulling a judgment on that ground when relief is sought in a separate action after the time for motion for a new trial has expired. Relief of this kind is granted in equity only when it appears clearly that manifest injustice will follow if the relief be withheld. The pleadings and affidavits in this case do not contain sufficient showing for vacation of a former judgment on this ground.

—Krahn v. J. L. Owens Co. 374.

BECAUSE OF ADMISSION OF EVIDENCE.

4. Action for injury to plaintiff's child of 3 years when run over by defendant's delivery wagon. New trial granted because of admission of evidence tending to show that the driver was a careful driver and that he never had an accident before.

—Marks v. Brown, 406.

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NEW TRIAL—Continued.

Because Verdict Was so Excessive as to Indicate Passion and Prejudice.

See Appeal and Error, 27.

NOTICE.

To Insurer of Formation of Corporation to Succeed Partnership.

See Insurance, 17.

To Insured of Representations in Copy of Application Attached to Policy.

See Insurance, 26.

Of Fraud to Indorsee of Note.

See Bills and Notes, 4.

Of Claim of Homestead.

See Homestead, 1.

Of Sale on Foreclosure of Chattel Mortgage.

See Chattel Mortgage, 6, 7.

OFFICER.

Order of Removal.

1. Proceedings for the removal of a public officer under civil service regulations, when removal can be made for cause only, are judicial in character, and an order of removal issued therein takes effect and becomes operative from its date.
—Markus v. City of Duluth, 225.

2. Where there is no suspension of the officer pending the proceeding, the order does not relate back to the date of the commencement thereof.
—Markus v. City of Duluth, 225.

Suspension Pending Removal.

3. In the absence of statute so declaring, the commencement of proceedings under civil service regulations for the removal of a public officer does not of itself operate as a suspension of the officer pending the proceeding, nor deprive him of the right to continue in the office and receive the compensation incident thereto.
—Markus v. City of Duluth, 225.

Action of de jure Officer to Recover Compensation.

4. The payment of the compensation to a de facto officer, who is installed in the office, with notice of the rights of the de jure officer,

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OFFICER—Continued.

who is wrongfully excluded from the office, is no defense to an action by such de jure officer to recover the compensation for the period during his wrongful exclusion.
—Markus v. City of Duluth, 225.

OPTION.

FOR TERMINATION OF LEASE ON NONPAYMENT OF RENT NOT FOR BENEFIT OF LESSEE.

See LANDLORD AND TENANT, 4.

UNDER ALTERNATIVE JUDGMENT.

See JUDGMENT, 3.

PARENT AND CHILD.

IMPUTED NEGLIGENCE.

1. Acquiescence by a parent in the use by his child of explosives which he has found where they had been negligently left by a stranger destroys the latter's responsibility for injury to the child caused by the explosives.
—Peterson v. Martin, 195.

FATHER'S LIABILITY FOR SUPPORT OF ABANDONED CHILDREN.

2. Where a father abandons his minor children and thereby compels their mother, his divorced wife, to care for and support them, the law will imply a promise on the part of the father to reimburse the mother for money spent in doing that which he ought to have done.
—Beigler v. Chamberlin, 377.

CHILD NOT ENTITLED TO COMPENSATION FOR SERVICES AFTER REACHING MAJORITY.

See EXECUTOR AND ADMINISTRATOR, 2.

CLAIM FOR SERVICES OF CHILD.

See DAMAGES, 14, 15.

PARTIES TO ACTION. See MECHANIC'S LIEN, 2; SET-OFF AND COUNTERCLAIM, 1.

SET-OFF AND COUNTERCLAIM.

A cause of action in favor of the defendants against one of the plaintiffs in which no effective judgment can be entered without joining other

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PARTIES TO ACTION—Continued.

parties with the plaintiff cannot be maintained unless such parties are joined.

—Apelt v. Melin, 269.

COUNTY A PARTY IN JUDICIAL DITCH PROCEEDING.

See DRAIN, 3.

PAYMENT.

OF INSURANCE PREMIUM.

See INSURANCE, 18, 19.

PLAT. See COSTS.

PLEADING.

CONSTRUCTION OF ALLEGATION OF ADVANCEMENT.

1. An allegation in pleading that an advancement was made cannot be construed as an allegation that a loan was made, even though the donee after the death of the donor makes an agreement to repay.

—Kuhne v. Gau, 34.

ISSUE NOT PLEADED OR VOLUNTARILY LITIGATED.

2. Action on promissory notes given in payment of stock bought. Defense, the fraud of the agent in selling the stock. A prospectus handed to defendant stated the assets of the corporation were "free and clear." In a deposition taken 18 months before the trial, it was shown there was a purchase money mortgage on the land of the corporation. No such misrepresentation was alleged in the answer. Defendant did not ask leave to amend his answer so as to set up this misrepresentation. The issue was not voluntarily litigated. An issue not pleaded nor voluntarily litigated on the trial cannot be made the basis for relief.

—Thorpe v. Cooley, 431, 433.

COMPLAINT.

See DEATH BY WRONGFUL ACT; EXECUTION; MORTGAGE, 1; RAILWAY, 6.

ANSWER.

See CORPORATION, 13, 14; LANDLORD AND TENANT, 7.

REPLY — DEPARTURE.

3. In an action on a promissory note in which the answer alleges that the note was without consideration and never became effective, a reply

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PLEADING—Continued.

which sets forth the contract under which the note was executed and the actual consideration therefor tends to show that such defense is not well founded, and is not a departure from the cause of action upon the note.
—Frost v. Jerousek, 292.

DEMURRER.

See EXECUTION.

AMENDMENT.

See PLEADING, 2.

AMENDMENT AT TRIAL.

See EVIDENCE, 3.

4. Amendment of a pleading during the trial rests largely in the discretion of the trial court.
—Heuser v. Chicago, Burlington & Quincy Railroad Co. 286.

POLICE POWER. See MUNICIPAL CORPORATION, 3.

POSSESSION.

CONSTRUCTIVE POSSESSION OF PROPERTY IS A LEGAL FICTION.

See PROPERTY.

CONSTRUCTIVE POSSESSION OF CONTRABAND GAME IN TRANSIT.

See CRIMINAL LAW, 2-4.

PREGNANCY. See INSURANCE, 31-33.

PRINCIPAL AND AGENT.

IMPLIED AUTHORITY OF SERVANT TO EMPLOY ASSISTANCE IN EMERGENCY.

See WORKMEN'S COMPENSATION ACT, 4.

ERROR OF AGENT IN WRITING INSURANCE APPLICATION CHARGEABLE TO INSURER.

See INSURANCE, 24.

RIGHT OF AGENT TO COMMISSION ON SALE BY PRINCIPAL.

1. Plaintiff, an Illinois corporation, appointed defendant exclusive representative for the sale of its products in the states of Minnesota and Iowa, agreeing to pay a stated commission on accepted orders.

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PRINCIPAL AND AGENT—Continued.

Defendant had attempted, without success, to obtain an order from a certain Minneapolis dealer; thereafter, while in Chicago, a representative of said dealer gave an order for plaintiff's products to an agent of plaintiff whom he met there, which order was filled by plaintiff and shipped to the dealer at Minneapolis. It is *held* that defendant was not entitled to a commission on this order.
—Aluminum Products Co. v. Anderson, 142.

ACTION AGAINST AGENT.

2. It is not error to strike out the evidence in regard to a claim of defendant, as not within the issues made by the pleadings.
—Aluminum Products Co. v. Anderson, 143.

3. The record fails to show that defendant was entitled to commissions in excess of the amount allowed by the trial court.
—Aluminum Products Co. v. Anderson, 143.

APPARENT AUTHORITY OF AGENT.

4. A principal is bound by the acts of his agent within the apparent or ostensible authority with which he has clothed him when the one dealing with him and invoking an estoppel relies in good faith upon the appearance of authority and by it is induced to act. This doctrine is applied to a case where the plaintiff confided to her agent all the negotiations for the exchange of property with the defendant, intrusted him with a deed executed by her with the name of the grantee blank, and instructed him not to deliver until she was satisfied with the title, and he, disregarding his instructions, filled the blank and made delivery and received the defendant's deeds in return, and the defendant in making the exchange acted in good faith in reliance upon the apparent authority of the agent; and upon evidence either proving or fairly tending to establish such facts there was an issue for the jury upon the ultimate question whether the plaintiff because of apparent and ostensible authority in her agent relied upon by the defendant was precluded from repudiating the transaction.
—Schauble v. Hedding, 187.

5. The supreme court of Minnesota has always distinguished between apparent and ostensible authority and implied authority, the latter alone constituting authority in fact, and conveniently enough has rested liability substantially upon estoppel. The distinction though often useful is not always observed. Frequently there is confusion.

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PRINCIPAL AND AGENT—Continued.

The evidence that tends to show implied authority may show apparent authority.

—Schauble v. Hedding, 190.

PRINCIPAL AND SURETY.

RELEASE OF SURETY ON BUILDING CONTRACT.

See CONTRACT, 3.

1. Payments to the amount of three-fourths of the actual value of the work then performed were required to be made monthly, on or before the tenth day of each month, and plaintiff was to retain the remaining one-fourth until the completion of the work. The fact that, in consequence of paying these amounts as the work progressed, plaintiff had paid more than three-fourths of the contract price before the completion of the work, did not discharge the sureties.

—Milavetz v. Oberg, 216.

2. Work began about October 1, and, at the request of the builder, payments were made during that month to the amount of $205. Defendants insist these payments were not due until November and plaintiff violated the contract by making them in October. The court sees no violation of the contract, provided the payments did not exceed 75 per centum of the value of the work done at the time they were made.

—Milavetz v. Oberg, 219, 220.

3. Evidence which would justify a finding that plaintiff owner, at the request of the principal contractor and of the plumber subcontractor and pursuant to an agreement that the note should be transferred to and accepted by the plumber for the balance due him, executed a note for $400 due in 90 days, and as part of the same transaction it was transferred to and accepted by the plumber as agreed, and that plaintiff subsequently paid it. *Held*: The note was not given to accommodate plaintiff, and so far as the principal contractor was concerned was equivalent to money, and the jury were justified in finding that neither the principal contractor nor his sureties had been prejudiced thereby.

—Milavetz v. Oberg, 221.

4. The evidence is sufficient to sustain the finding of the jury that plaintiff substantially complied with the requirements of the contract in the matter of making payments during the progress of the work.

—Milavetz v. Oberg, 215.

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PRINCIPAL AND SURETY—Continued.

EVIDENCE.

5. Plaintiff obtained a judgment against the principal contractor in which his sureties were named defendants, but the judgment was not against them. This judgment was received in evidence without objection and the court charged the jury that, if the sureties had not been released from liability on their bond, the jury should return a verdict in favor of plaintiff for the amount of this judgment, and this the jury did. Another judgment in the action to foreclose the mechanics' liens materially exceeded the amount of the first judgment. If the former judgment had not been received in evidence, defendants' liability would, so far as the record shows, have been measured by the amount of the liens as established in the second judgment. *Held*: To give the first judgment the effect of reducing that liability did not prejudice the defendants.
—Milavetz v. Oberg, 222, 223.

JUDGMENT AGAINST OWNER IN MECHANICS' LIEN.

6. Defendants, having been given a proper opportunity to defend the action brought to enforce the liens filed against the building for labor and material, are bound by the judgment rendered therein.
—Milavetz v. Oberg, 216.

PROCESS.

SERVICE OF SUMMONS.

See EXECUTION.

SERVICE BY MAIL.

See JUDGMENT, 2.

SERVICE BY PUBLICATION.

In actions to quiet title the statute permits service by publication "when the subject of the action is real or personal property within the state," etc., and the affidavit is required to state such ground. An affidavit stated "that the subject of this action is real property in this state," but did not give the name of the state. It is *held* that the affidavit was sufficient and that jurisdiction was aquired.
—Smith v. Ince, 223.

PROPERTY.

CONSTRUCTIVE POSSESSION.

The constructive possession of property as defined in the books is a fiction of the law, and as applied to movable chattels, except in at-

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PROPERTY—Continued.

tachment, garnishment, or other special proceedings, theoretically places the property with the person of the legal owner at his domicile.

—State v. Giller, 369.

PUBLIC POLICY.

As to Exemption of Public Cemetery from Taxation.

See Cemetery, 1.

Contract Between Detective and Grand Jurors.

See Detective.

PUBLIC LAND.

Right of Company to Land Grant.

1. The right of the Great Northern Railway Company to lands granted under the act of Congress of July 2, 1864, attaches upon the filing with and acceptance by the Interior Department of the map of definite location, but does not apply to lands upon which a homestead entry is pending.

—Baker v. Berg, 109.

2. The act of Congress of March 3, 1871, authorizing change of branch lines, does not become effective until the filing of the release therein provided for with the Interior Department.

—Baker v. Berg, 109.

Withdrawal of Land From Market.

3. Where the Land Department transmitted to the district land office a map showing the 10 and 20 mile place and indemnity limits of the grant under the act of March 3, 1865, and withdrew the odd-numbered sections within such limits from market, the withdrawal becomes effective and remains in force until revoked.

—Baker v. Berg, 109.

Passing of Title from United States.

4. The title to public land does not pass from the government until the issuance of a patent, and while the title is in the United States no adverse possession of it can, under a state statute of limitations, confer a title which will prevail against the legal title under a patent from the government.

—Baker v. Berg, 110.

QUOTIENT VERDICT. See Trial, 3, 4.

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RAILROAD AND WAREHOUSE COMMISSION.

CONTROL OF TELEPHONE COMPANIES UNDER LAWS 1915, p. 208, c. 152.

See CONSTITUTION, 2; TELEGRAPH AND TELEPHONE.

RAILWAY. See MUNICIPAL CORPORATION, 11.

CASHMAN DISTANCE TARIFF ACT.

See CARRIER, 1, 2.

DUTY TO CONSTRUCT OVERHEAD CROSSINGS AT ITS OWN EXPENSE.

See MUNICIPAL CORPORATION, 3, 4.

DUTY TO STRENGTHEN BRIDGE FOR STREET RAILWAY, WHEN NECESSARY.

See STREET RAILWAY, 1.

INJURY TO EMPLOYEE.

See MASTER AND SERVANT, 1-3.

1. Plaintiff's foot was caught in an unblocked frog of a switch which belonged to defendant railway and connected side tracks built on land of an elevator company with defendant's right of way. *Held*: Whether defendant was liable for the condition of the switch was a question for the jury.
—Hoggarth v. Minneapolis & St. Louis Railroad Co. 472.

PRESUMPTION OF DUE CARE IN OPERATION.

2. No inference may be indulged that the statutory warnings and signals were not given by plaintiff, or that there was excessive speed or other negligence in the management of the train, as the presumption is that those in charge used due care in its operation.
—St. Paul Southern Electric Railway Co. v. Flanagan, 125.

ACCIDENT AT HIGHWAY CROSSING.

3. In the nature of things, the trains or cars operated by railroads along their own right of way are not expected to give precedence to persons or vehicles at intersections of public highways. The necessity of rapid and safe public transportation forbids the slowing down of trains at every highway intersection so as to give the traveler on the highway, who perchance is nearer the intersection, the right to cross first. Statutory enactments impliedly recognize that it is the duty of travelers on public highways to refrain from

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RAILWAY—Continued.

attempting to pass over a railroad grade crossing when there is danger of collision with an approaching train.

—St. Paul Southern Electric Railway Co. v. Flanagan, 124.

4. Just at dawn in a heavy wind and sleet storm in November, plaintiff drove his horses toward a railway crossing with which he was familiar. The curtains of his buggy were closed, but he leaned forward beyond them, looked and listened for a train and brought his horses to a walk. He did not see or hear a train, but, as he passed the corner of a building on a side track 37 feet from the main track, the glare from the headlight of a locomotive fell on his horses, one of which jumped and they ran across the track in front of the locomotive. *Held*: The evidence made a question for the jury as to whether defendant's negligence to give the usual warnings of the approach of the train was the proximate cause of the injury, and as to whether plaintiff was chargeable with contributory negligence.

—Martin v. Minneapolis & St. Louis Railroad Co. 40.

5. Upon the facts stated in the complaint the question of defendant's negligence in driving a traction engine and grain separator upon the tracks of an electric railway at a highway crossing, when there was a dense fog, without ascertaining whether a train, then known by him to be due, was approaching, and without notifying the operator of the train that he was attempting to make the crossing, is for the jury.

—St. Paul Southern Electric Railway Co. v. Flanagan, 123.

6. The complaint does not, by allegations or by inference from facts alleged, show contributory negligence.

—St. Paul Southern Electric Railway Co. v. Flanagan, 123.

INJURY ON BRIDGE.

7. The evidence is *held* sufficient to support the finding of the jury that the plaintiff sustained an injury while on the portion of a street bridge over the tracks of the defendant railway which it was under obligation to keep in condition for travel.

—Schmitt v. City of Minneapolis, 193.

8. It was not error to receive the testimony of a witness, who examined the bridge two weeks after the accident, and found a defect in the bridge, corresponding to that claimed by the plaintiff; the purpose being to locate the place where the accident occurred.

—Schmitt v. City of Minneapolis, 193.

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RAPE. See CRIMINAL LAW, 5, 13-16.

RECORD.

RECORDING ACT EMBRACES EQUITABLE TITLES.

See VENDOR AND PURCHASER.

REFEREE.

APPOINTMENT FOR JUDICIAL DITCHES.

See DRAIN, 1.

REPLEVIN.

WILL NOT LIE.

See SALE, 3.

CORRECTION OF JUDGMENT BY LIMITING RECOVERY OF POSSESSION TO CHATTELS MORTGAGED.

See JUDGMENT, 7.

SALE.

AGENT NOT ENTITLED TO COMPENSATION FOR SALE BY PRINCIPAL.

See PRINCIPAL AND AGENT, 1.

MISREPRESENTATION OF MATERIAL FACT.

1. A representation, in negotiations for sale, that the property has never been offered for sale for less than $5,000, when in fact an option to buy has been given for $1,400, is a misrepresentation of a material fact. Statement of opinion as to value does not ordinarily constitute actionable fraud.
—Vath v. Wiechmann, 87.

PASSING OF TITLE TO GOODS SOLD.

2. In contracts for the sale of goods, the test as to whether the title vests immediately in the buyer is the intention of the parties. The rules for ascertaining such intention are well settled, and are as follows:

(1) Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property, unless a different intention appears, passes to the buyer when the contract is made, and it is immaterial whether time of payment or the time of delivery, or both, be postponed.

(2) Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of

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SALE—Continued.

putting them into a deliverable state, the property does not pass until such thing be done.
—Jock v. O'Malley, 390.

3. Plaintiff contracted to sell and defendant to buy approximately 80,000 feet of lumber, then piled on a designated tract of land, at $14 per thousand feet, mill run, on ground described; terms $200 in cash, balance on or before 60 days from date of contract. Defendant made the cash payment, and with plaintiff's consent took the lumber and hauled it away. The deferred payment not having been made, plaintiff brought this action to replevy the lumber. *Held*, that title had passed and replevin would not lie.
—Jock v. O'Malley, 388.

4. When plaintiff was informed by defendant that the latter was about to have the lumber scaled, he declined to take part in the making of such scale, for the reason that he had already scaled it himself. A contract like this is presumed to pass title, and when plaintiff took the position that the quantity had already been determined and permitted defendant to take the lumber and haul it away without objection, such presumption became conclusive and plaintiff foreclosed himself from asserting thereafter that title had not passed. If the lumber had subsequently been destroyed by fire or otherwise, the loss would have fallen upon defendant, not upon plaintiff.
—Jock v. O'Malley, 391.

SEAL. See DEED; MORTGAGE, 3.

SET-OFF AND COUNTERCLAIM. See CHATTEL MORTGAGE, 8; PARTIES TO ACTION.

1. An answer set up a counterclaim to have a deed to plaintiff and his wife declared a mortgage, to have it decreed that the note which it was given to secure was usurious and to quiet title in defendants. The land was conveyed to plaintiff and his wife jointly. She was not a party and it was not sought to make her a party, but she was a necessary party to an effective decree. *Held*: It was not error to strike out the counterclaim.
—Apelt v. Melin, 270.

2. Action on a promissory note. Defense a set-off for $700 and a counterclaim for $75. Plaintiff sold to defendant a tract of land for the owner on which his commission amounted to $700. Before the sale was completed plaintiff and defendant entered into a writing by

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SET-OFF AND COUNTERCLAIM—Continued.

which defendant agreed to pay plaintiff $500 for his share of the profit on the land. After the sale both plaintiff and defendant demanded the commission of the former owner and plaintiff brought suit against him for the $700. He obtained an order requiring defendant to interplead in the action whereupon defendant appeared and presented the same claim as in this action. The issue was tried and judgment rendered for plaintiff. The facts so pleaded and litigated in that action constitute the set-off interposed in this action.

Held: The counterclaim in this action was without merit.
—Cronan v. Wolfe, 308.

SPECIFIC PERFORMANCE. See EXECUTOR AND ADMINISTRATOR, 5; VENDOR AND PURCHASER.

OF CONTRACT BY ONE SPOUSE FOR SALE OF HOMESTEAD.

See HOMESTEAD, 4.

VENUE.

OBJECT OF ACTION ESSENTIALLY PERSONAL, BUT SOMETIMES INCIDENTALLY IN REM.

See VENUE, 2.

1. The action for the specific performance of a contract for the sale of land is not wholly local in its essential respects, and as to the place of trial is controlled by G. S. 1913, § 7721.
—State ex rel. v. District Court of Pennington County, 336.

2. Such an action is local or in rem only incidentally and to the extent the judgment therein may decree title to the land in the event the defendant refuses to convey the same in obedience to the command of the court.
—State ex rel. v. District Court of Pennington County, 336.

STATUTE.

While a city charter may have the same effect as an act of the legislature, yet it does not constitute a law of the state. It is applicable to the city only and is a law of limited application.
—Sullwold v. City of St. Paul, 274.

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See INSURANCE, 24.

STREET RAILWAY.

USE OF STREET FOR ITS PURPOSES.

See MUNICIPAL CORPORATION, 10.

STRENGTHENING BRIDGE.

1. It is the uncompensated duty of a commercial railroad which intersects a public street to construct and maintain a bridge over its tracks when reasonable public necessity and safety demand. The use of a street for street railway traffic is a public use in aid of public travel. When the use of such street for a street railway line becomes an appropriate use of the street, though it was not so used at the time the bridge was constructed, it is the uncompensated

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STREET RAILWAY—Continued.

duty of the railroad to strengthen it, if this be necessary, to make it fit for such use. It does not discharge its duty by maintaining a bridge adequate for passenger and vehicle traffic, and for all traffic except street railway traffic, when the use of the street for street railway traffic becomes an appropriate and needed use.

—City of St. Paul v. Great Northern Railway Co. 25.

INJURY TO PASSENGER ALIGHTING FROM CAR.

See CARRIER, 6-8.

COLLISION—CONTRIBUTORY NEGLIGENCE.

2. Collision between the automobile plaintiff was driving and defendant's street car at a street crossing where the street car was approaching rapidly on a down grade and was beyond the control of the motorman. *Held*: The defense of contributory negligence was for the jury.

—Otto v. Duluth Street Railway Co. 312, 315.

3. Where a passenger in an automobile, on approaching a street intersection over which street cars are operated, hears a street car coming thereon at a high or dangerous rate of speed, it is a question for the jury whether, in the exercise of ordinary care, he should have warned the driver of the automobile, and whether a failure so to warn contributed to the collision, then occurring between the automobile and street car.

—Christison v. St. Paul City Railway Co. 456.

CHARGE TO JURY CONCERNING OPERATION OF STREET CARS.

See TRIAL, 1.

SUICIDE. See INSURANCE, 25; WORKMEN'S COMPENSATION ACT, 19.

SUNDAY.

SALE OF INTOXICATING LIQUOR.

See INTOXICATING LIQUOR, 1, 2.

SUNSTROKE. See WORDS AND PHRASES, 1; WORKMEN'S COMPENSATION ACT, 10, 11, 16.

TAXATION.

ASSESSMENT.

1. In the Minnesota statutes relating to taxation the words "assess" and "assessed" have from the beginning referred to the valuation of

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TAXATION—Continued.

property by the assessor. The auditor fixes the rate of taxation from data supplied him by the taxing authorities, he computes and extends the tax upon the assessed valuation made by the assessor, or that valuation as corrected by the reviewing board. If in a very limited sense it may be said that the auditor assesses the taxes, he does not in any sense assess the property.

—Trask v. Skoog, 231.

NOTICE OF EXPIRATION OF REDEMPTION.

2. Land is assessed, within the meaning of section 2148, G. S. 1913, on the day the assessor certifies and returns to the auditor the assessment books wherein the assessor has valued the land for the purposes of taxation; and from and after that date a notice to terminate the right of redemption from a tax sale, issued before another assessment is made and returned by the assessor, must be directed to the person in whose name the land is assessed upon the books so certified and returned by him.

—Trask v. Skoog, 229.

INHERITANCE TAX.

See EXECUTOR AND ADMINISTRATOR, 1.

TELEGRAPH AND TELEPHONE.

REGULATION OF USE OF STREETS SINCE LAWS 1915, p. 208, c. 152.

See MUNICIPAL CORPORATION, 1.

SURRENDER OF FRANCHISE TO MUNICIPAL CORPORATION UNDER ACT OF 1915.

See CONSTITUTION, 2.

TELEPHONE ACT OF 1915.

The main purpose of Laws 1915, p. 208, c. 152, placing all telephone companies under the control of the Railroad and Warehouse Commission, was to regulate and control telephone companies in respect to service to the public. Insofar as existing municipal franchises related to such service, no good reason suggests itself why the same might not be modified or annulled, at any time, by agreement between the legislature and the companies, as provided by section 15 of that act.

—State ex rel. v. Holm, 284.

TENDER. See CORPORATION, 11.

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TITLE.

RULES AS TO PASSAGE OF TITLE TO GOODS SOLD.

See SALE, 2.

TOMBSTONE. See EXECUTOR AND ADMINISTRATOR, 1.

TOWN.

VALIDITY OF CONTRACT BETWEEN TOWNS TO MAINTAIN HIGHWAY.

See BRIDGE.

TRIAL.

NOTICE OF TRIAL OF APPEAL UNNECESSARY.

See EMINENT DOMAIN, 5.

AMENDMENT OF PLEADING.

See PLEADING, 4.

AMENDMENT OF COMPLAINT.

See EVIDENCE, 3.

QUESTION FOR JURY.

See CHATTEL MORTGAGE, 1; COMPROMISE AND SETTLEMENT; EXECUTOR AND ADMINISTRATOR, 3; MUNICIPAL CORPORATION, 13, 14, 16; NEGLIGENCE, 3, 5; RAILWAY, 1, 4.

FORM OF CHARGE LEFT TO JUDGE.

See NEW TRIAL, 1.

CHARGE TO JURY.

See APPEAL AND ERROR, 24; CRIMINAL LAW, 12.

1. In view of the specific charge that plaintiff was bound to use his senses to avoid collisions when crossing street car tracks, it cannot be said to be prejudicial error to instruct the jury that plaintiff had a right to rely upon defendant not operating its car negligently; for it was immediately followed by the statement that those operating the street cars had a right to assume that persons about to cross the car tracks would exercise ordinary care for their own safety. —Otto v. Duluth Street Railway Co. 312.

REFUSAL TO CHARGE JURY.

See CHATTEL MORTGAGE, 2.

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TRIAL—Continued.

REFUSAL TO GIVE REQUESTS.

See INSURANCE, 16.

JURY NOT BOUND BY UNCONTRADICTED TESTIMONY.

2. Uncontradicted evidence which is unimpeached and not improbable cannot be arbitrarily disregarded but must be given effect. But a jury is not bound to accept testimony as true, merely because uncontradicted, if improbable, or where the surrounding facts and circumstances or what is developed on cross-examination furnish reasonable grounds for doubting its credibility.
—Olsson v. Midland Insurance Co. 427, 428.

QUOTIENT VERDICT.

3. A quotient verdict is one where the jury agree in advance that each shall set down on paper the amount of damages which, in his opinion, should be allowed, the sum of such amounts to be divided by 12 and the quotient accepted as the verdict.
—Larson v. Wisconsin Railway, Light & Power Co. 162, 163.

4. While a quotient verdict is irregular, and would not be permitted to stand, yet the court will not set aside a verdict as a quotient simply on account of the amount thereof.
—Larson v. Wisconsin Railway, Light & Power Co. 159.

FINDINGS OF COURT.

See APPEAL AND ERROR, 28.

AMENDMENT OF FINDINGS AND CONCLUSIONS.

5. The trial court may, at any time before judgment, and before the cause has been removed from its jurisdiction by appeal, amend its findings of fact and conclusions of law, even though the result thereof be an order for judgment the reverse of that ordered by the original findings.
—Wold v. Wold, 409.

TROVER AND CONVERSION.

OF PROPERTY COVERED BY CHATTEL MORTGAGE.

See CHATTEL MORTGAGE, 8.

OF UNMORTGAGED CHATTELS MINGLED WITH THOSE MORTGAGED.

See CHATTEL MORTGAGE, 2, 3.

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TROVER AND CONVERSION—Continued.

Plaintiff turned over certain personal property to defendant in part payment of a debt, and defendant accepted it as such part payment. Subsequently defendant brought suit for the debt and recovered a judgment, which he collected. Thereafter plaintiff, claiming that no credit for the part payment had been given in the former suit, brought this suit for conversion of the property. *Held*, that an action for conversion will not lie, as the ownership of the property had passed from plaintiff to defendant, and that plaintiff should have asserted his claim of part payment in the former suit.
—Peltier v. Nadeau, 126.

TYPHOID FEVER.

See WORKMEN'S COMPENSATION ACT, 15, 16.

USURY. See SET-OFF AND COUNTERCLAIM, 1.

VENDOR AND PURCHASER.

CONTRACT OF SALE—EQUITABLE TITLE OF VENDEE.

The defendant Stusse on September 13, 1912, sold his farm to the defendant Hanson for $12,000, received part payment, executed a contract of sale, and put him in possession. Hanson, on June 4, 1914, sold to the defendant Feldman for $17,000, of which $5,000 was paid by a transfer of merchandise, $7,000 was to be paid by the assumption of payments due Stusse, and $5,000 was to be paid in 1920. He assigned to him his contract with Stusse, executed a contract of sale, which provided that the $5,000 due in 1920 should be paid before deed or be secured by mortgage, and put him in possession. Feldman assigned his interest to the plaintiff Shraiberg on June 13, 1914. The contract between Stusse and Hanson and Hanson's assignment to Feldman were recorded on June 9, 1914. The assignment from Feldman to the plaintiff was recorded on June 15, 1914. The contract between Feldman and Hanson was recorded on July 13, 1914. The plaintiff seeks specific performance without paying or securing the $5,000 due in 1920. He claims that he is a bona fide purchaser of an equitable title without notice of the contract relative to securing the $5,000, and that he is protected by the recording act. *Held*:

(1) The vendee in a subsisting contract of sale has an equitable title; and by the transaction recited Hanson acquired the equitable title, and Stusse retained the legal title as security.

(2) The assignment of June 4, 1914, conveyed Hanson's equitable title to Feldman. The contract of the same date charged Feldman's title with payment of the $5,000 due in 1920. The assignment

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VENDOR AND PURCHASER—Continued.

of June 13, 1914, conveyed Feldman's title to the plaintiff, and was recorded prior to the recording of the contract of June 4, 1914. The recording act embraces equitable titles. The plaintiff, if a bona fide purchaser from Feldman, is protected against the earlier executed but later recorded contract, pledging the farm as security for the payment of the $5,000 due in 1920.

(3) The burden of proving that he was a bona fide purchaser within the recording act was upon the plaintiff; and evidence that plaintiff is the father-in-law of Feldman, never saw the land, was never in Minnesota, never owned lands in this country, and neither speaks, writes nor understands English, does not sustain a finding that plaintiff was a bona fide purchaser.

—Shraiberg v. Hanson, 80.

VENUE. See CRIMINAL LAW, 1-4; SPECIFIC PERFORMANCE, 1, 2.

OF BASTARDY PROCEEDING.

See BASTARD.

LOCAL ACTION—CONSTRUCTION OF STATUTE.

1. Section 7715, G. S. 1913, providing for the trial of actions concerning rights and interests in real property in the county where the land is located, applies only to such actions as are wholly local, as distinguished from those that are partly local and partly transitory.

—State ex rel. v. District Court of Pennington County, 336.

ACTION FOR SPECIFIC PERFORMANCE.

2. The object of the action of specific performance is to compel defendant to perform his contract by the execution to plaintiff of a deed to the land. It is personal in its essential particulars, and in rem only incidentally and to the extent the final judgment may decree a transfer of the land in the event defendant refuses to comply with the command of the court to execute a proper deed.

—State ex rel. v. District Court of Pennington County, 338.

VILLAGE OF LITCHFIELD. See CONSTITUTION, 2.

WAIVER. See CONTRACT, 3; INSURANCE, 18, 19, 27, 28; LANDLORD AND TENANT, 4, 5; MUNICIPAL CORPORATION, 4.

OF FRAUD.

See BILLS AND NOTES, 1.

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WARRANTY.

IMPLIED WARRANTY AS TO QUALITY OF WELL WATER.

See CONTRACT, 2; WATER AND WATERCOURSE.

WATER AND WATERCOURSE.

Action for contract price for drilling a well. Defense that the purpose of drilling the well was to obtain water for farm use, that plaintiff knew of that purpose, and the water obtained was not fit for that purpose. *Held*: There was no implied warranty by the driller as to the quality of the water to be obtained.
—Skalsky v. Johnson, 276.

WILL.

ENFORCEMENT OF CONTRACT TO MAKE DEVISE.

1. In an action to enforce a contract by which defendants agreed to make plaintiff their heir at law, and to leave him at their death all their property, in consideration that plaintiff would become a member of their household and render and perform such services and labor as would be expected from a natural son, it is *held* that the evidence supports the findings of the trial court, and that the conclusions of law are sustained by the findings of fact.
—Wold v. Wold, 410.

2. The promisee in such case may act upon an attempted repudiation and sue at once to protect his rights, or he may delay such suit until the happening of the event, the death of the promisor, that would vest in him the right secured by the contract.
—Wold v. Wold, 410.

ATTESTATION.

3. Attestation is the act of witnessing the execution of an instrument and subscribing the name of the witness in testimony of such fact.
—Kroschel v. Drusch, 322, 325.

4. It is not necessary that attestation be formally requested by the testator. Whether it is necessary that the witnesses should know that the document is a will is not decided.
—Kroschel v. Drusch, 322.

5. There is evidence that, when one of the witnesses was called, he was told that he was to witness a testament, that he saw the testator and the other witness sign, and was told, in the conscious presence of the testator and within his hearing, that the instrument was the

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WILL—Continued.

testator's will and he was asked to sign it as a witness, and that he then did so. This evidence was sufficient to sustain a finding of attestation under any definition of that term.
—Kroschel v. Drusch, 322.

UNDUE INFLUENCE.

6. Will contest. The evidence sustains the finding of the trial court that the will was not procured by undue influence.
—Kroschel v. Drusch, 322.

GIFT TO A CLASS.

7. Where a gift is made by will to a class of persons and immediate distribution is contemplated, the persons constituting the class are determined as of the death of the testator.
—Savela v. Erickson, 93.

8. Where the bequest to the class is contingent, the members constituting the class are not determined as of any time earlier than the vesting of the estate.
—Savela v. Erickson, 93.

9. Where a gift is to a class and the right of enjoyment is postponed, beyond the time that it vests in right, and until the termination of a preceding estate, the members entitled to take are determined as of the time when the gift to the class vests in enjoyment.
—Savela v. Erickson, 93.

WITNESS.

TESTIMONY OF GRAND JURORS AS TO THEIR PROCEEDINGS.

See GRAND JURY, 2.

CONVERSATIONS WITH DECEDENT.

1. Where land which was owned by her father is claimed as a gift by her brother, and by her sister under their father's will, a witness has no such interest in the result of the action, direct or indirect, as to disqualify her under G. S. 1913, § 8378, from testifying as to conversations with her father about the alleged gift.
—Drager v. Seegert, 9.

2. The financial secretary of the local lodge was not an incompetent witness because of G. S. 1913, § 8378, forbidding one interested in the event of an action from testifying to conversations with or admissions of a deceased.
—Havlicek v. Western Bohemian Fraternal Assn. 63.

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WITNESS—Continued.

LEADING QUESTIONS.

3. Leading questions are largely in the sound discretion of the trial court, and in the instant case there was no abuse of such discretion. —Heuser v. Chicago, Burlington & Quincy Railroad Co. 286.

CROSS-EXAMINATION.

4. The extent to which, upon cross-examination, inquiry may be made concerning a witness' pecuniary interest in the claim in litigation, is left to the sound discretion of the trial court. —Flick v. Ellis-Hall Co. 364.

CONTRADICTION OF WITNESS ON IMMATERIAL POINT.

See EVIDENCE, 3.

WORDS AND PHRASES.

"ASSESS." See TAXATION, 1.

"ATTESTATION." See WILL, 3.

"BUSINESS" AS USED IN WORKMEN'S COMPENSATION ACT. G. S. 1913, § 842.

See WORKMEN'S COMPENSATION ACT, 2.

LOSS RESULTING FROM "ONE ACCIDENT."

See INSURANCE, 2, 3.

"QUOTIENT VERDICT." See TRIAL, 3, 4.

"REPLACEMENT." See INSURANCE, 5.

RESERVATION INDIANS ARE "RESIDENTS" OF STATE WITHIN CONST. (MINN.) ART. 7.

See INDIAN, 1.

"RESIDENT OWNERS" IN CHARTER OF ST. PAUL. See MUNICIPAL CORPORATION, 6.

SUNSTROKE.

1. Sunstroke or heat-stroke is a condition of the body produced by great heat, associated, as a rule, with marked humidity and physical exertion, and may occur at night as well as day, provided the atmosphere is hot and moist. —State ex rel. v. District Court of Ramsey County, 252.

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WORDS AND PHRASES—Continued.

TRADE OR PROFESSION.

2. When we speak of a person's trade or profession we generally refer to that branch of the world's activities wherein he expends his usual everyday efforts to gain a livelihood.
—State ex rel. v. District Court of Douglas County, 106.

WORKMEN'S COMPENSATION ACT.

LIABILITY OF INSURER OF EMPLOYER TO PAY JUDGMENT IN FAVOR OF WORKMAN.

See INSURANCE, 6, 7.

LIMITATION OF RECOVERY.

AMENDMENT OF 1915 NOT RETROACTIVE.

1. Section 8, chapter 209, p. 294, Laws 1915, which limits the time to recover under the compensation act to one year after the occurrence of the injury, does not apply to claims that accrued before the passage of the 1915 statute.
—State ex rel. v. District Court of St. Louis County, 213.

CASUAL EMPLOYMENT.

2. The word "business" in section 8202 must have the same general significance with respect to the work or calling of the employer as the words "trade," "profession" or "occupation," hence they must refer to the employer's ordinary vocation and not to every occasional, incidental or insignificant work he may have to do.
—State ex rel. v. District Court of Douglas County, 106.

3. The erection of a temporary shed by defendant, upon a farm owned but not operated by him, cannot be held to be an employment within the usual course of the trade, business, profession, or occupation of defendant, so as to make him liable under the Workmen's Compensation Act to a person accidentally injured in such erection while casually employed.
—State ex rel. v. District Court of Douglas County, 103.

4. Relator was engaged in the retail sale and delivery of coal and other fuel; one of his wagons loaded with coal for delivery to a purchaser became mired and the team hitched thereto was unable to remove it; the driver in charge thereof requested plaintiff, who was passing the scene, to assist in releasing the wagon, and in complying with the request plaintiff was injured.

It is *held*, that though not otherwise in relator's employ, plaintiff was its servant and employee in rendering the assistance stated; that the driver in charge of the wagon so mired had implied author-

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WORKMEN'S COMPENSATION ACT—Continued.

ity to employ him for the temporary purpose, and plaintiff is entitled for the injury suffered by him in rendering the assistance to appropriate relief under the Workmen's Compensation Act.
—State ex rel. v. District Court of Ramsey County, 416.

5. The compensation allowed by the trial court during the period of disability, not exceeding 300 weeks, is within the evidence and justified by the statute.
—State ex rel. v. District Court of Ramsey County, 416.

ACCIDENT ARISING OUT OF THE EMPLOYMENT—WHAT IS.

6. Where the work and the condition of the place where it is carried on expose the employee to the happening of an event causing the accident, there is no longer a risk to which all are exposed, and the result is an accident arising out of the employment.
—State ex rel. v. District Court of Ramsey County, 250.

7. Freezing is a personal injury caused by accident, within the meaning of the Workmen's Compensation Act. It comes suddenly and violently as distinguished from gradually or naturally in ordinary course.
—State ex rel. v. District Court of St. Louis County, 131, 133.

8. A workman froze his thumb while working as a swamper. His work required him to cut and handle timber, and his hands came in contact with the snow. His work was several miles from camp, and there were no facilities for warming. The weather was severely cold. A finding that the freezing arose out of the employment is sustained by the evidence.
—State ex rel. v. District Court of St. Louis County, 131.

9. The evidence is *held* to sustain a finding that the injury to the relator, a janitor, who was frozen in severely cold weather while shoveling snow from the sidewalks about a building, was an accidental injury arising out of his employment within the Workmen's Compensation Act.
—State ex rel. v. District Court of Ramsey County, 260.

10. Sunstroke is a personal injury caused by accident, within the meaning of the Workmen's Compensation Act.
—State ex rel. v. District Court of Ramsey County, 250.

11. A laborer working on a hot day without protection from the sun on a sandy street, where the sand was moist from the rain of the preceding night, is exposed to an unusual danger different from that to which the mass of men engaged in like employment are subjected.
—State ex rel. v. District Court of Ramsey County, 252.

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WORKMEN'S COMPENSATION ACT—Continued.

SAME—WHAT IS NOT.

12. A messenger boy, who in performing his duties traverses the streets of a city, departs from the scope of his employment when he climbs upon a passing vehicle, not owned or controlled by his employer, for the purpose of expediting his work, so that an accident which befalls him when upon such vehicle cannot be said to arise out of and in the course of his employment under the Workmen's Compensation Act.

—State ex rel. v. District Court of Hennepin County, 326.

13. A man whose duty is to remedy troubles in the service which an electric company furnishes its customers as soon as notified of such trouble, is not performing work for his master when he is on the way home to supper, when there is no evidence that he is receiving pay for the time so spent, even though he is called on to return to work after his supper hour on extra pay.

—Otto v. Duluth Street Railway Co. 313, 314.

14. Defendant and plaintiff's employer were both under the Workmen's Compensation Act when plaintiff suffered the injuries sued for, through the alleged negligence of defendant. Defendant's defense, that plaintiff's sole remedy is compensation under the act, was rightly held not made out; for it conclusively appeared that the accident, causing the injury, did not take place during the hours of plaintiff's service, nor upon the premises where the services were being performed or where his service required his presence at the time of the injury.

—Otto v. Duluth Street Railway Co. 312.

15. By restricting the injuries for which compensation is to be made to those caused by accident and by defining the term accident to mean "an unexpected or unforeseen event, happening suddenly and violently * * * producing at the time injury to the physical structure of the body," the legislature clearly manifested an intention to exclude from the operation of the law disabilities caused by disease, unless the disease resulted from an accident of the character above described, and the courts must give effect to such intention. *Held*: Typhoid fever caused by drinking infected water is not caused by an accident of the character defined in the law.

—State ex rel. v. District Court of Rice County, 210, 212.

16. There is a marked contrast between the sudden and violent effect of

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WORKMEN'S COMPENSATION ACT—Continued.

a sunstroke and the drinking of water infected with typhoid germs, as it requires days of time after the infection for the disease to develop.

—State ex rel. v. District Court of Ramsey County, 254.

TEMPORARY PARTIAL DISABILITY.

17. The workman suffered an injury to his left leg below the knee, which subsequently necessitated a surgical operation and the removal of about 5 inches of the tibia bone, which had become diseased by reason of the injury. The evidence was clear and the court found, that the bone is gradually reforming and will so continue until the normal condition is fully restored and the limb thus made as useful as before the injury. *Held*: The disability is temporary and not permanent.

—Porter v. Ritchie, 136, 137.

18. When the question is whether a partial disability is temporary or permanent, it is not conclusive, as a matter of law, that relator may be required to pay more for the injury, if it be held a temporary than would be required if held a permanent partial disability. Under the language of the statute such a situation may often arise.

—Porter v. Ritchie, 137.

ACCIDENT OR SUICIDE.

19. When violent death is shown, the presumption arises that it was not self-inflicted. As between accident and suicide, the law supposes accident until the contrary is shown. The evidence in this case is not conclusive of suicide and sustains a finding of accident.

—State ex rel. v. District Court for St. Louis County, 138.

FINDING SUSTAINED BY EVIDENCE.

20. Evidence by relators' physicians that the death of the employee was caused by pulmonary tuberculosis, and evidence of other witnesses that he was crushed under a load of lumber and several ribs were broken; that from that time to his death 6 weeks later he was confined to his bed; that he had worked at hard labor until the accident and had apparently been in good health previous to that time. *Held*: The finding of the trial court that the death of the deceased employee resulted from the injuries which he had sustained and not solely from disease, is sustained by the evidence.

—State ex rel. v. District Court of Ramsey County, 334.

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X-RAY. See Costs; Damages, 11.

WRIT.

Of Attachment. See Attachment.

Of Certiorari. See Municipal Corporation, 5.

Of Habeas Corpus. See Habeas Corpus.

Of Mandamus. See Criminal Law, 8.

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